(1) 89-157

No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

JOHN P. CAUSEY, JR., Individually and as Executor of the Estate of JOHN P. CAUSEY, SR., and as Administrator with Will Annexed of the Estate of VIRGINIA D. CAUSEY, *et al.*, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED *

1. Do the Federal Rules of Evidence bar admission of a defendant's subsequent remedial measures when those remedial measures were or might have been required by a government regulatory agency?

2. In a case being tried to a jury by special verdict under Federal Rule of Civil Procedure 49(a), does the District Court err if it informs the jury of the legal effect of its answers to the special verdict interrogatories when such an instruction is not necessary to enable the jury to make its findings?

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* In addition to the respondents listed on the capition, other parties in the Court of Appeals were Simon Ryder, individually and as heir of John Wilson Ryder deceased, and Margaret G. Johns, as guardian *ad litem* for John Treloar Ryder, Sarah Jane Ryder, and Simon Bruce Ryder, minors.

In compliance with Supreme Court Rule 28.1, petitioner states that it is a wholly owned subsidiary of Pan Am Corporation and that it has the following subsidiaries or affiliates which are not wholly owned by it or by Pan Am Corporation: Aeronautical Radio, Inc., Air Cargo, Inc., Airline Tariff Publishing Company, Escola Americana de Rio de Janeiro, Honolulu Fueling Facilities Corporation, International Aeradio (Caribbean) Ltd., Liberian Development Corporation, Manhattan Air Terminal, Inc., Nigerian Aviation Handling Co., Promotora de Hoteles de Turismo Medellin, S.A., Social Immobiliaria Norteamericana, S.A., and Societe International de Telecommunications Aeronautiques.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
RULES, TREATIES, AGREEMENTS, AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
1. Initial Proceedings	3
2. The Second Trial	5
a. Informing the Jury of the Legal Effects of Its Decision	5
b. The Hudson Report and Plaintiffs' Wilful Misconduct Claim	6
c. Plaintiffs' Lack of Notice Claim	8
3. The Court of Appeals' Decision	9
REASONS FOR GRANTING THE WRIT	10
I. WHETHER THE FEDERAL RULES OF EVIDENCE PROTECT REMEDIAL MEASURES THAT ARE DEVELOPED AND IMPLEMENTED BY A DEFENDANT UNDER GOVERNMENTAL SUPERVISION IS AN IMPORTANT QUESTION AS TO WHICH THE CIRCUITS ARE IN CONFLICT	10
A. The Decision Below Conflicts with Decisions in Four Circuits	10
B. Whether the Federal Rules of Evidence Protect Subsequent Remedial Measures of a Defendant that Are Required or Recommended by the Government Is a Question of Recurring Importance	15

TABLE OF CONTENTS—Continued

	Page
II. THE DECISION BELOW CONFLICTS WITH OTHER DECISIONS ON SPECIAL VERDICTS AND PRESENTS AN IMPORTANT QUESTION OF JUDICIAL ADMINISTRATION, PARTICULARLY WITH RESPECT TO CASES ARISING UNDER THE WARSAW CONVENTION	18
CONCLUSION	21
APPENDIX:	
Opinion of the Court of Appeals, dated March 27, 1989	1a
Notice from Clerk's Office, Court of Appeals for the Ninth Circuit, regarding entry of judgment on March 27, 1989	10a
Opinion of the Court of Appeals, dated August 24, 1982	11a
Order of the Court of Appeals Denying Petition for Rehearing, dated June 21, 1989	38a
Opinion of the District Court, dated October 27, 1978	39a
Special Verdict Form Used in District Court	62a
Judgment of the District Court, filed July 24, 1986	65a
Excerpts from the Hudson Report	67a
Excerpts from Trial Transcript. May 12, 1986	84a
Excerpts from Trial Transcript, May 13, 1986	95a
Excerpts from Trial Transcript, May 21, 1986	101a
Federal Rules of Evidence 401, 403 and 407	106a
Federal Rule of Civil Procedure 49 (a)	107a
Warsaw Convention, Articles 22 and 25	108a
Montreal Agreement of 1966	110a
Former Civil Aeronautics Board (now Department of Transportation) Regulations, 14 C.F.R. §§ 221.175-.176	113a

TABLE OF AUTHORITIES

CASES: Page

Bauman v. *Volkswagenwerk Aktiengesellschaft*, 621 F.2d 230 (6th Cir. 1980) 13
Benitez-Allende v. *Alcan Alumino do Brasil, S.A.*, 857 F.2d 26 (1st Cir.), *cert. denied*, 109 S.Ct. 1135 (1988) 11
Cate v. *Good Brothers, Inc.*, 181 F.2d 146 (3d Cir.), *cert. denied*, 340 U.S. 826 (1950) 20
Chan v. *Korean Air Lines, Ltd.*, 109 S.Ct. 1676 (1989) 8, 9, 19
Chase v. *General Motors Corp.*, 856 F.2d 17 (4th Cir. 1988) 13
Fasanaro v. *Mooney Aircraft Corp.*, 687 F. Supp. 482 (N.D. Cal. 1988) 11
Gullett v. *St. Paul Fire & Marine Insurance Co.*, 446 F.2d 1100 (7th Cir. 1971) 20
Herndon v. *Seven Bar Flying Service, Inc.*, 716 F.2d 1322 (10th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984) 12, 13
In re Airport Disaster at Metropolitan Airport, Detroit, No. 84-1660 (6th Cir., Dec. 3, 1985) (available on Westlaw) 13
In re Korean Air Lines Disaster, 664 F. Supp. 1463 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd sub nom. Chan* v. *Korean Air Lines, Ltd.*, 109 S.Ct. 1676 (1989) 9
Kociemba v. *G.D. Searle & Co.*, 683 F. Supp. 1579 (D. Minn. 1988) 12
Lindsay v. *Ohio Pharmaceutical Corp.*, 637 F.2d 87 (2d Cir. 1980) 13, 14
Lolie v. *Ohio Brass Co.*, 502 F.2d 741 (7th Cir. 1974) 12
Lowery v. *Clouse*, 348 F.2d 252 (8th Cir. 1965) 20
Machin v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963) 16, 17
Millard v. *Municipal Sewer Authority*, 442 F.2d 539, 541 (3d Cir. 1971) 20
Motor Vehicle Manufacturers Association v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) 17

TABLE OF AUTHORITIES—Continued

	Page
Perricone v. *Kansas City Southern Railway Co.*, 704 F.2d 1376 (5th Cir. 1983)	19
Ratigan v. *New York Central Railroad Co.*, 291 F.2d 548 (2d Cir.), *cert. denied*, 368 U.S. 891 (1961)	20
Rocky Mountain Helicopter, Inc. v. *Bell Helicopter Textron, Div. of Textron, Inc.*, 805 F.2d 907 (10th Cir. 1986)	11
Rozier v. *Ford Motor Co.*, 573 F.2d 1332 (5th Cir.), *rehearing denied*, 578 F.2d 871 (1978)	12
Skidmore v. *Baltimore & O.R. Co.*, 167 F.2d 54 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948)	18
Thedorf v. *Lipsey*, 237 F.2d 190 (7th Cir. 1956)	20
United States v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984)	16
Villari v. *Terminix International, Inc.*, 692 F. Supp. 568 (E.D. Pa. 1988)	14, 15
Vinieris v. *Byzantine Maritime Corp.*, 731 F.2d 1061 (2d Cir. 1984)	19
Vockie v. *General Motors Corp.*, 66 F.R.D. 57 (E.D. Pa.), *aff'd mem.* 523 F.2d 1052 (3d Cir. 1975)	14
Walther v. *Omaha Public Power District*, 412 F.2d 1164 (8th Cir. 1969)	20
Werner v. *Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981)	12, 13, 17
Wolf by Wolf v. *Procter & Gamble Co.*, 555 F. Supp. 613 (D.N.J. 1982)	15
STATUTES:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1332	3
49 U.S.C. app. § 1441	16
Consumer Product Safety Act 15 U.S.C. §§ 2051 *et seq.*	16
Federal Aviation Act 49 U.S.C. app. §§ 1301 *et seq.*	15
Federal Food, Drug, and Cosmetic Act 21 U.S.C. §§ 301 *et seq.*	16

TABLE OF AUTHORITIES—Continued

Page

Federal Insecticide, Fungicide and Rodenticide Act
7 U.S.C. §§ 136 *et seq.* 16
Occupational Safety and Health Act
29 U.S.C. §§ 651 *et seq.* 16
National Traffic and Motor Vehicle Safety Act
15 U.S.C. §§ 1381 *et seq.* 15
Toxic Substances Control Act
15 U.S.C. §§ 2601 *et seq.* 16

RULES AND REGULATIONS:

14 C.F.R. §§ 221.175-.176 2
14 C.F.R. § 221.175(b) 8
29 C.F.R. § 1910.1001(j) 16
Civil Aeronautics Board, Docket 26274, 39 Fed. Reg. 1526 (Jan. 10, 1974) 3
Fed. R. Civ. P. 49(a) 2, 18
Fed. R. Evid. 401 2
Fed. R. Evid. 403 ..... 2, 14
Fed. R. Evid. 407 ..... *passim*

TREATIES AND AGREEMENTS:

"Hague Protocol," The Protocol To Amend the Convention for the Unification of Certain Rules Pertaining to International Carriage by Air, *done* at The Hague, Sept. 28, 1955, 478 U.N.T.S. 371 ..... 3, 4
"Montreal Agreement," Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order E-23680, Docket 17235, 31 Fed. Reg. 7302 (May 13, 1966), note following 49 U.S.C. app. § 1502 ..... *passim*
"Warsaw Convention," Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), note following 49 U.S.C. app. § 1502 ..... *passim*

TABLE OF AUTHORITIES—Continued

OTHER MATERIALS: Page

Advisory Committee Notes to Proposed Federal Rules of Evidence, 56 F.R.D. 183 (1972) 17

Annual Report of the Director of the Administrative Office of the United States Courts, at 188 (Table C-2) (1988) 15

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PAN AMERICAN WORLD AIRWAYS, INC.,
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JOHN P. CAUSEY, JR., Individually and as Executor of the Estate of JOHN P. CAUSEY, SR., and as Administrator with Will Annexed of the Estate of VIRGINIA D. CAUSEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Pan American World Airways, Inc. ("Pan Am") respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals on appeal from the second trial in these cases (App. 1a) is reported at 871 F.2d 812 (1989). The order of the court of appeals denying Pan Am's petition for rehearing and suggestion for rehearing *en banc* (App. 38a) is unreported. The relevant evidentiary orders and jury instructions of the

district court in the second trial (App. 89a, 94a, 96a-100a) are also unreported. The opinion of the court of appeals on appeal from the first trial in these cases (App. 11a) is reported at 684 F.2d 1301 (1982), and the district court's opinion following the first trial (App. 39a) is reported at 462 F. Supp. 1114 (1978).

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1989. App. 1a, 10a. A timely petition for rehearing was denied on June 21, 1989. App. 38a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES, TREATIES, AGREEMENTS, AND REGULATIONS INVOLVED

Rules 401, 403, and 407 of the Federal Rules of Evidence (App. 106a) and Rule 49(a) of the Federal Rules of Civil Procedure (App. 107a) are reproduced in the Appendix. Also reproduced in the Appendix are the relevant provisions of the Warsaw Convention,[1] a treaty of the United States (App. 108a); the Montreal Agreement,[2] a private agreement among various air carriers that was approved by the Civil Aeronautics Board ("CAB") (App. 110a); and certain regulations of the Department of Transportation, which were initially issued by the CAB, 14 C.F.R. §§ 221.175-.176 (App. 113a).

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), note following 49 U.S.C. app. § 1502; hereinafter cited as "Warsaw Convention."

[2] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, which was approved by CAB Order E-23680, Docket 17235, 31 Fed. Reg. 7302 (May 13, 1966), note following 49 U.S.C. app. § 1502; hereinafter cited as "Montreal Agreement."

STATEMENT OF THE CASE

1. *Initial Proceedings.* On April 22, 1974, Pan Am Flight 812 departed from Hong Kong on a flight to Los Angeles with scheduled intermediate stops. On its approach to the airport at the island of Bali, Indonesia, the aircraft crashed killing all 96 passengers and 11 crew members.

Numerous law suits arising out of the crash were brought in the federal district courts [3] and were transferred to the District Court for the Central District of California. All but three cases were settled. The unsettled cases related to the deaths of John and Virginia Causey, passengers who were residents of Virginia, and John W. Ryder, a passenger who was an Australian national. Pan Am was named as a defendant in these cases, as were certain crew members and manufacturers who were subsequently dismissed.[4]

Because Flight 812 was an international flight, the plaintiffs' damages were subject to the limitations in the Warsaw Convention, as supplemented by the Montreal Agreement and the Hague Protocol.[5] The plaintiffs con-

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[3] The courts had diversity of citizenship jurisdiction. 28 U.S.C. § 1332.

[4] The other defendants were Lee B. Zinke, Executrix of the Estate of Donald B. Zinke (the captain of Flight 812), Bank of America National Trust and Savings Association and Marianne D. Schroeder, Executors of the Estate of John E. Schroeder, Jr. (the first officer of Flight 812), the Boeing Company, Collins Manufacturing Company, and Rockwell International Company. These defendants were dismissed, and they are no longer interested in this case. See Pre-Trial Conference Order, ¶ 1, approved Nov. 13, 1984, reproduced in the Excerpts of Record ("Exc. Rec.") filed in the court of appeals, 3 Exc. Rec. 811, 812.

[5] Article 22 of the Warsaw Convention (App. 108a) sets a limit of 125,000 gold French francs, an amount the Civil Aeronautics Board at the time of the accident had interpreted as being approximately $10,000. Civil Aeronautics Board, Docket 26274, 39

tended that the Convention's limitations on damages did not apply because (1) California law displaced the Convention and, in any event, (2) Article 25 of the Convention removed the limitation on damages in cases where the carrier engaged in wilful misconduct. In a trial held in 1978, the jury found that the crash was caused by negligence and not by any wilful misconduct. The jury awarded $300,000 in compensatory damages to the Causeys and $651,500 in compensatory damages to the Ryders.

The district court declined to reduce the amounts of those awards to the limits of the Warsaw Convention and its supplemental agreements. The court held that California law applied instead. 462 F. Supp. 1114 (1978), App. 39a. On appeal, the Ninth Circuit reversed and remanded the cases for a new trial on the issue of wilful misconduct.[6] 684 F.2d 1301 (1982), App. 11a.

Fed. Reg. 1526 (Jan. 10, 1974). (Before 1974, the limitation had been understood to be about $8300.) Article 22 further provides, however, that a carrier may agree to a higher limitation of liability. In the Montreal Agreement, Pan Am agreed to increase the limitation to $75,000 per passenger for tickets involving a point of travel within the United States. App. 110a.

Pan Am contended that the Causey claims were limited to $75,000 each by the Montreal Agreement and the claims on behalf of Mr. Ryder, whose ticket was not subject to the Montreal Agreement, should be limited to $20,000 by the Hague Protocol of 1955 (which had been ratified by Australia, but not by the U.S.). The Protocol To Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *done* at The Hague, Sept. 28, 1955, 478 U.N.T.S. 371.

[6] The court of appeals held first that the Warsaw Convention preempted California law. 684 F.2d at 1306-08, App. 16a-21a. On plaintiffs' cross-appeal, the court further ruled that the district court had erroneously excluded certain records of relevance to plaintiffs' claim of wilful misconduct. 684 F.2d at 1313-15, App. 31a-37a. It stated that there "need be no new trial on damages." 684 F.2d at 1315 & n.17, App. 37a.

2. *The Second Trial.* The second trial was held in May and June, 1986. Plaintiffs presented two theories of proof aimed at removing the treaty limitations on damages: (1) Pan Am was guilty of wilful misconduct, and (2) Pan Am had failed to provide adequate notice of the limitations to the decedents.

a. *Informing the Jury of the Legal Effects of Its Decision.* Prior to trial, Pan Am contended that the jury should not be advised that its findings relating to wilful misconduct and "adequate notice" would determine whether plaintiffs' compensatory damages would be capped in accordance with the Warsaw Convention and related agreements.[7] The District Court overruled this motion, stating that the jury should be told "why it is here again for a second trial" and that "it has to be explained, albeit briefly, about Warsaw and Montreal."[8] Thereafter, the trial judge informed the panel of jurors before *voir dire* about the legal effects of their factual findings, stating that, if the jury eventually decided against plaintiffs, they would be limited to a smaller amount of money "controlled by something that we call the Warsaw Convention" and that the limitation "is now $75,000."[9] The judge repeated the limitation a few minutes later when he stated that the purpose of the notice requirement was to tell the passenger: "[I]f you are killed in this accident, your survivors may be stuck with a $75,000 ceiling . . . ."[10] In closing argument, plaintiffs' counsel emphasized that the jury's findings on wilful misconduct and adequate notice would determine whether plaintiffs' damages were capped.[11]

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[7] Memorandum of Points and Authorities in Support of Motions *in Limine*, at 10-11, Oct. 22, 1985, 3 Exc. Rec. 867-68; Tr. May 12, 1986, at 3-10, App. 85a-89a.

[8] Tr. May 12, 1986, at 7, App. 88a.

[9] Tr. May 13, 1986, at 13, App. 97a.

[10] *Id.* at 14, App. 98a.

[11] The Ryders' attorney said: "This is a defendant that will not take responsibility. His Honor has given me permission to tell

b. *The Hudson Report and Plaintiffs' Wilful Misconduct Claim.* To support their contention as to wilful misconduct, plaintiffs contended that the performance record of the captain, Donald Zinke, showed that he was an incompetent who should never have been in command of Flight 812. According to plaintiffs, Pan Am's failure to dismiss Zinke was due to systemic corporate failures concerning pilot training and evaluation. In this connection, plaintiffs relied on two investigative reports, which in their view allegedly showed there had been at Pan Am "long-term malaise involving management inaction in the face of ongoing pilot . . . infractions and deviations from the standards of the industry." [12]

The more damaging of these reports—the "Hudson report"—had been prepared by a special team of Federal Aviation Administration ("FAA") officials assembled to inspect Pan Am because of the Bali crash and earlier accidents.[13] App. 67a. That investigation commenced five days after the Bali crash, and the report was issued over a year later. App. 67a. Pan Am, as the report stated, gave its "whole-hearted cooperation" (App. 69a) in trying to remedy any deficiencies in its operations. The report states that the FAA "team believed that through excellent cooperation on the part of PAA [Pan Am] and its employees, our investigation was a much shorter and

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you that the Warsaw limitation on my Australian clients means they would get $8500. That's the reason Pan American is fighting this, not because of honor, which is an undisguised way of trying to get your sympathy . . . ." Tr. June 2, 1986, at 13-159. Causey's attorney called the limitation a "supernumerary" that the airline industry had "been able to hang on to . . . all these years," stating that "[y]ou and I or anybody else, any manufacturer, don't have that." Tr. June 2, 1986, at 13-12.

[12] Brief for Plaintiffs-Appellees, at 4, in No. 86-6453, 9th Cir.

[13] The other general report regarding Pan Am's operations was an internal corporate review, dated April 23, 1974, and referred to as the "Thomas report." It is reproduced at 1 Exc. Rec. 237-320.

easier task and a general spirit of government and industry mutually trying to solve a problem together was displayed throughout." App. 69a.

The Hudson report identified the remedial steps that Pan Am was already taking and made numerous additional recommendations for improvement of operations at Pan Am. The report stated that "PAA has already initiated many management, technical, and procedural changes . . . , and our report to some degree will highlight areas that PAA is aware of and has or is considering appropriate corrective action." App. 67a. In this connection, the report attached a 29-page document by Pan Am identifying corrective actions.[14] That document, for example, identified steps being taken to establish a review board for airmen with proficiency problems and plans to increase pilot-in-command training.[15]

The Hudson report concluded that Pan Am had had "substandard" captains and first officers, including "Captain D.B. Zenke [*sic*], who was killed in the B-707 accident at Bali." App. 72a-73a. This conclusion rested in substantial part on the fact that Pan Am had removed a large number of pilots from service after the Bali crash. A table in the report showed a dramatic increase in early retirements at Pan Am in 1974. App. 73a.

Over Pan Am's objection,[16] the district court ruled that the Hudson report and its attachments were admissible.[17] Plaintiffs' experts repeatedly referred to the report's con-

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[14] This part of the Hudson report is reproduced at 1 Exc. Rec. 350-78.

[15] 1 Exc. Rec. 362-63.

[16] Memorandum of Points and Authorities in Support Motions *in limine*, at 17-31, 42-43, Oct. 22, 1985, 3 Exc. Rec. 874-88, 899-900.

[17] Tr. May 12, 1986, at 17, App. 94a. The report was admitted at the end of trial. Tr. May 30, 1986, at 12-111. Counsel for Pan Am continued to object to its admission. *Id.* at 12-108 to -111.

tents and pointed out the post-crash remedial efforts of Pan Am as described in the report, emphasizing particularly the increased rate of retirement for allegedly "substandard" pilots.[18] Plaintiffs' counsel also emphasized the Hudson report in closing argument, urging the jury to look at it and stressing that it had been prepared by "a neutral panel of experts." [19]

In a special verdict, the jury found that Captain Zinke and the crew of Flight 812 had *not* been guilty of wilful misconduct, but that Pan Am had committed wilful misconduct by entrusting the flight to Zinke with knowledge of his unfitness or incompetence.[20]

c. *Plaintiffs' Lack of Notice Claim.* In the second trial, plaintiffs also contended that the damage limitations of the Warsaw Convention/Montreal Agreement did not apply because Pan Am had failed to provide adequate notice of those limitations to the decedents. It was agreed that the tickets contained the standard notice and were printed in the specified point of type. See *Chan* v. *Korean Air Lines, Ltd.*, 109 S. Ct. 1676, 1678-79 (1989) (citing cases). But plaintiffs contended that the standard ticket notice was nonetheless inadequate to inform passengers of the limitations of the Warsaw Convention.[21] In addition, they contended that the travel agencies that had sold Pan Am tickets to the decedents had not complied with a CAB regulation requiring that signs be posted informing passengers that damage claims might be limited by the Warsaw Convention. 14 C.F.R. § 221.175(b).

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[18] Testimony of Donald E. Kemp, Tr. May 21, 1986, at 6-99 to -101; *id.*, at 6-120 to -121, App. 102a-104a; Testimony of Jesse Russell Cottle, Tr. May 21, 1986, at 6-176 to -177, App. 104a-105a.

[19] Tr. June 2, 1986, at 13-73 to -74.

[20] App. 62a. The special verdict form reproduced in the Appendix is a carbon copy produced by plaintiffs' counsel in the court of appeals after the original was lost.

[21] In effect, plaintiffs were equating the ticket notice requirement with the requirement in product liability law that a manufacturer

Over objection,[22] the district judge allowed plaintiffs to try these claims and instructed the jury on plaintiffs' legal theories of notice.[23] The jury in its special verdict found that Pan Am had delivered tickets to the passengers with adequate warnings, but that there had not been warning signs on display in all of the locations where the Pan Am tickets were sold. App. 63a.

3. *The Court of Appeals' Decision.* Since the jury found two bases for defeating the Warsaw limitations on liability, the district court, on July 24, 1986, entered judgment awarding plaintiffs the full amount of damages fixed in the first trial. App. 65a. The Ninth Circuit affirmed the judgment in a *per curiam* opinion.

The court of appeals held that the admission of the Hudson report did not violate Fed. R. Evid. 407: "[T]he Hudson report does not qualify as a subsequent remedial measure [under Rule 407] because it was prepared by the FAA without the voluntary participation of Pan Am." 871 F.2d at 816 (footnote omitted), App. 8a. As to Pan Am's claim that the district court erred in informing the jury of the legal effects of its findings, the Ninth Circuit held that the district judge had not abused his discretion, in part because the jury had to be informed of the limitations to understand the adequate notice issue. 871

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must provide consumers with an adequate warning about a product's potential dangers. They even produced two expert witnesses to support the claim that the average passenger would not understand the standard ticket notice. Tr. May 14, 1986, at 17-142.

[22] Pan Am moved *in limine* to exclude evidence as to such claims, Memorandum of Points and Authorities in Support of Motions *in Limine*, at 37-42, Oct. 22, 1985, 3 Exc. Rec. 894-99; Tr. May 12, 1986, at 24-26. Pan Am cited in support of its position the district court opinion which this Court subsequently upheld in *Chan. In re Korean Air Lines Disaster*, 664 F. Supp. 1463 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd sub nom. Chan* v. *Korean Air Lines, Ltd.*, 109 S.Ct. 1676 (1989).

[23] Tr. June 3, 1986, at 22-25.

F.2d at 815, App. 4a-6a. While the court thus found information about the treaty limitations necessary so that the jury could decide whether Pan Am had given adequate notice, it also held later in the opinion that it need not decide whether it was error to let the adequate notice issue go to the jury, since the judgment could be affirmed on the verdict of wilful misconduct. 871 F.2d at 817, App. 9a.

Pan Am petitioned for rehearing and suggested rehearing *en banc* with regards to the court's rulings that the Hudson report was admissible and that the jury could properly have been informed as to the legal effects of its findings. That petition was denied on June 21, 1989, App. 38a.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE FEDERAL RULES OF EVIDENCE PROTECT REMEDIAL MEASURES THAT ARE DEVELOPED AND IMPLEMENTED BY A DEFENDANT UNDER GOVERNMENTAL SUPERVISION IS AN IMPORTANT QUESTION AS TO WHICH THE CIRCUITS ARE IN CONFLICT.

A. The Decision Below Conflicts with Decisions in Four Circuits.

The court of appeals held that where a private defendant is legally obligated to cooperate with a governmental agency in developing and implementing remedial measures after an accident or injury has occurred, those subsequent remedial measures are admissible as evidence notwithstanding Rule 407 of the Federal Rules of Evidence. The court reasoned: "The purpose of Rule 407 is not implicated in cases involving subsequent measures in which the defendant did not voluntarily participate. Where the defendant has not voluntarily participated in the subsequent measure at issue, the admission of that measure into evidence does not 'punish' the defendant for his efforts to remedy his safety problems." 871 F.2d at 817,

App. 8a. The court then ruled that, although Pan Am was to be commended for its cooperation in the Hudson investigation, it was "legally obligated to cooperate," and "[t]hus, the admission of the Hudson report did not penalize Pan Am for its voluntary participation in safety measures." *Id.*

In this case, the Hudson report recommended corrective measures at Pan Am on such items as pilot training and removal and supported its recommendations by citing the measures that Pan Am itself had already undertaken, including increasing significantly the early retirement of allegedly "substandard" pilots in 1974.[24] Plaintiffs used the evidence of those remedial measures at trial to establish wilful misconduct. The court of appeals nonetheless found that none of those measures by Pan Am were voluntary, despite its cooperation, apparently because the measures could have been required in any event by the FAA. Whether a defendant's subsequent remedial measures that a government agency could or did require are admissible to prove the defendant's culpability is a question that divides the circuits.

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[24] The court of appeals was correct in saying that it did not need to address the issue of whether post-accident studies by themselves are covered by Rule 407. 871 F.2d at 816 n.2, App. 8a. The cases that the court cited have ruled that post-accident testing and studies as such are not remedial measures covered by Rule 407. *Rocky Mountain Helicopter, Inc.* v. *Bell Helicopter Textron*, 805 F.2d 907, 918 (10th Cir. 1986); *Fasanaro* v. *Mooney Aircraft Corp.*, 687 F. Supp. 482, 486-87 (N.D. Cal. 1988). Accord, *Benitez-Allende* v. *Alcan Alumino do Brasil, S.A.*, 857 F.2d 26, 33 (1st Cir.), *cert. denied*, 109 S.Ct. 1135 (1988). But in each case, the court excluded from evidence the subsequent remedial measures actually undertaken by the defendant, such as redesign of the aircraft (*Rocky Mountain* and *Fasanaro*) or recall of the product (*Benitez-Allende*). In this case the Hudson report described the remedial measures actually undertaken or being undertaken by Pan Am. Consequently, even the cases that allow admission of post-accident testing reports could not support the admissibility of the Hudson report in its entirety.

On one hand, decisions from the Tenth, Fifth, and Seventh Circuits support the ruling below that a defendant's subsequent remedial measures must be in all respects voluntary if they are to be excluded from evidence. In *Herndon* v. *Seven Bar Flying Service, Inc.*, 716 F.2d 1322 (10th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984), the Tenth Circuit found that a post-crash FAA Airworthiness Directive (which prescribed additional precautions in operating the affected aircraft) was admissible, Rule 407 notwithstanding, because "[w]here a superior authority requires a tort feasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies Rule 407 has no force—a tort feasor cannot be discouraged from voluntarily making repairs if he *must* make them in any case." 716 F.2d at 1331 (emphasis in original). Similar interpretations of Rule 407 can be found in *Rozier* v. *Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir.) (*dictum*), *rehearing denied*, 578 F.2d 871 (1978), and in *Lolie* v. *Ohio Brass Co.*, 502 F.2d 741 (7th Cir. 1974) (Rule 407, before its adoption, cited as persuasive authority). Accord, *Kociemba* v. *G.D. Searle & Co.*, 683 F. Supp. 1579 (D. Minn. 1988).

On the other hand, the Fourth, Sixth, and Second Circuits, and district court decisions in the Third Circuit reject the voluntariness standard. In *Werner* v. *Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981), the Fourth Circuit held that Rule 407 bars evidence of a subsequent change in warning labels even though the change had been required by the Food and Drug Administration ("FDA"). The court pointed out that, in addition to its power to coerce, the FDA "also relies on voluntary compliance and compromise in determining the content of warnings and advertising for prescription drugs." 628 F.2d at 859. The Fourth Circuit reasoned that Rule 407 should apply because that Rule and the FDA regulations are intended to encourage vol-

untary compliance.[25] Moreover, that court went on to exclude government-required remedial measures in *Chase* v. *General Motors Corp.*, 856 F.2d 17 (4th Cir. 1988), where it held that evidence of the post-accident recall of a car model was inadmissible under Rule 407, even though it "was not any voluntary act on the part of GM . . . ." 856 F.2d at 21.

The Sixth Circuit reached an identical result to *Chase* in *Bauman* v. *Volkswagenwerk A.G.*, 621 F.2d 230 (6th Cir. 1980), where it held that the trial court had committed "basic error when it allowed plaintiffs to prove subsequent changes by the manufacturer in the design of the [car's] door latch." 621 F.2d at 232. This post-accident design change was inadmissible, even though "Volkswagen . . . claimed it [had] subsequently changed the design in order to comply with new government regulations." 621 F.2d at 233. Similarly, in an unpublished decision, the Sixth Circuit upheld the exclusion under Rule 407 of a post-accident Airworthiness Directive issued by the FAA. *In re Airport Disaster at Metropolitan Airport, Detroit*, No. 84-1660 (6th Cir., Dec. 3, 1985) (available on Westlaw). The Sixth Circuit declined to follow the Tenth Circuit's decision in *Herndon, supra*, because it found the Fourth Circuit's decision in *Werner* to be more persuasive.

A somewhat different approach was taken by the Second Circuit in *Lindsay* v. *Ortho Pharmaceutical Corp.*,

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[25] 628 F.2d at 859-60: "If subsequent warnings are admitted to prove antecedent negligence simply because FDA required or might have required the change, then drug companies may be discouraged from taking early action on their own and from participating fully in voluntary compliance procedures. . . . The FDA's regulations and policies encourage early unilateral action by the drug companies to improve their warnings, and Rule 407 promotes the same goal. We therefore hold that FDA regulations in the area of drug labeling do not require a new exception to Rule 407. Indeed, to find such an exception would subvert the policy goals of both Rule 407 and FDA Regulations . . . ."

637 F.2d 87 (2d Cir. 1980). There the court reversed a judgment for the plaintiff and held that the admission of post-injury changes in the drug's labeling, which had been "dictated in large extent by the FDA," had been prejudicial error. 637 F.2d at 93. While the court referred to Rule 407, its decision was based on the view that under Fed. R. Evid. 403, the probative value of such subsequent label changes had been outweighed by the danger of unfair prejudice and confusion. 637 F.2d at 93-94.

Finally, the courts in the Third Circuit have likewise refused to admit subsequent remedial measures when required or recommended by the government, although the rationales have been varied. The court in *Vockie* v. *General Motors Corp.*, 66 F.R.D. 57 (E.D. Pa.), *aff'd mem.*, 523 F.2d 1052 (3d Cir. 1975), relied on Rule 403 [26] in refusing to admit evidence of a car manufacturer's post-accident recall campaign and recall letters to car owners.[27] Alternatively, *Villari* v. *Terminix International, Inc.*, 692 F. Supp. 568, 574-75 (E.D. Pa. 1988), held that Rule 407 rendered inadmissible evidence that the defendant had, subsequent to plaintiffs' injuries, ceased to use certain pesticides, even though the Environmental Protection Agency at the time had been contemplating prohibiting their use. The court ruled that, for purposes of applying Rule 407, the voluntariness of a defendant's subsequent remedial efforts should be presumed "absent a clear show-

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[26] The case was tried before the Rules of Evidence took effect, but the court relied on them as persuasive guides. 66 F.R.D. at 60 n.2.

[27] The court in *Vockie* reasoned: "If such statements are admissible on a wholesale basis, manufacturers will be reluctant to come forth and make a full unqualified disclosure of any potential safety hazards which they discover. Manufacturers should not be inhibited, or prejudiced by, a good faith effort to protect the public safety and comply with their statutory duty." 66 F.R.D. at 61 (footnote omitted).

ing of coercion."[28] 692 F. Supp. at 574. Accord, *Wolf by Wolf* v. *Procter & Gamble Co.*, 555 F. Supp. 613 (D.N.J. 1982) (Rule 407 bars evidence of subsequent withdrawal of product from market when evidence shows that withdrawal voluntary, even though FDA had been contemplating requiring such action).

In short, the lower courts have reached conflicting results and employed a variety of conflicting rationales in determining whether evidence of subsequent remedial measures is admissible when the defendant developed or implemented those remedial measures under government supervision or compulsion.

B. Whether the Federal Rules of Evidence Protect Subsequent Remedial Measures that Are Required or Recommended by the Government Is a Question of Recurring Importance.

The admissibility of subsequent remedial measures that are required by or urged by government regulators is a recurring issue, especially in personal injury litigation involving air crashes, automobile design defects, prescription drugs, and pesticides.[29] In each of those areas, private companies are regulated by comprehensive federal regulatory schemes.[30] The issue will likely arise repeat-

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[28] The *Villari* court stated: "While it is true that the rule is hardly served by excluding evidence of a party acting under compulsion, it is also true that some remedial efforts would be deterred if a party was penalized for acting prior to such compulsion. Thus, the voluntariness of a remedial effort should be presumed absent a clear showing of coercion." 692 F. Supp. at 574.

[29] There is no way to tell how many cases may involve the issue presented here, but of the 239,634 civil cases commenced in the U.S. district courts for the 12 months ending June 1988, 41,148 (17%) involved personal injury claims. Thirty-nine percent of the personal injury cases (16,166) involved product liability claims. Annual Report of the Director of the Administrative Office of the United States Courts, at 180 (Table C-2) (1988).

[30] See Federal Aviation Act, 49 U.S.C. app. §§ 1301 *et seq.*; National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381

edly as to those companies and will likely arise as well with respect to companies regulated under different statutes.[31]

The issue has special importance to regulated companies, the relevant government agencies, and to the public health and safety. In aviation, it has long been recognized that public safety is best served if potential defendants are able to participate freely in accident investigations without being concerned that what is said might be used against them in later litigation. Thus, Congress has provided that the accident reports of the National Transportation Safety Board shall not be admissible in suits for damages. 49 U.S.C. app. § 1441(e). Confidential statements made to officials investigating military air crashes are likewise privileged and protected from discovery. *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984); *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963). Congress and the courts have determined that assurances that statements given to investigators will not be used in future litigation are necessary to advance the public interest in air safety. As the Inspector General of the Air Force stated in *Machin*, "[I]f investigators were unable to give such assurances, testimony in many instances would be less than fully factual and the determination of the exact causative factors would be jeopardized, thus seriously hindering the accomplishment of prompt corrective action designed to preclude recurrences of similar accidents." 316 F.2d at 339.

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et seq.; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.*; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 *et seq.*

[31] *E.g.*, Consumer Products Safety Act, 15 U.S.C. §§ 2051 *et seq.*; Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.*; Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.* For instance, the issue might arise in asbestos litigation with respect to the admissibility of revised warning labels required under the Occupational Safety and Health Act. See 29 C.F.R. § 1910.1001(j).

While *Machin* and similar cases deal with statements to accident investigators, the same policy applies to post-accident remedial measures designed to prevent similar accidents from recurring. Indeed, the Advisory Committee's Note accompanying the proposed Rule 407 stated that the "more impressive[] ground for exclusion [of subsequent remedial measures] rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." 56 F.R.D. 183, 226 (1972). As the Fourth Circuit in *Werner* (628 F.2d at 859) and other courts have recognized, that policy is not limited to protecting the unilateral conduct of an unregulated company; the policy of Rule 407 applies with the same force to a company which is cooperating with a public agency to determine what subsequent remedial measures should be taken to protect the public health and safety in light of an accident.

The court below, to be sure, suggested that there is no need for Rule 407 when an agency has the power to require a defendant to develop or implement remedial measures necessary to protect the public safety. But that view is fundamentally misguided. Safety agencies would be hindered and their work delayed, if, in place of wholehearted cooperation, affected companies responded to safety investigations and recommendations with great caution and in some instances with resistance.[32] The interpretation of Rule 407 espoused by the court of appeals discourages companies from taking "steps in furtherance of added safety," contrary to the Rule's purpose. This Court should grant review to correct that interpretation.

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[32] As this Court has noted, regulated companies sometimes resist adoption of proposed safety measures by "wag[ing] the regulatory equivalent of war . . . ." *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 49 (1983).

II. THE DECISION BELOW CONFLICTS WITH OTHER DECISIONS ON SPECIAL VERDICTS AND PRESENTS AN IMPORTANT QUESTION OF JUDICIAL ADMINISTRATION, PARTICULARLY WITH RESPECT TO CASES ARISING UNDER THE WARSAW CONVENTION.

Rule 49(a) of the Federal Rules of Civil Procedure authorizes the use of special verdicts so that the jury can decide discrete issues of fact and the judge may separately apply the law to the facts found by the jury. Many years ago Judge Jerome Frank pointed out that, when a special verdict under Fed. R. Civ. P. 49(a) is used, "the judge need not—should not—give any charge about the substantive legal rules beyond what is reasonably necessary to enable the jury to answer intelligently the question put to them. As, accordingly, the jury is less able to know whether its findings will favor one side or the other, the appeal to the jurors' cruder prejudices will frequently be less effective." *Skidmore* v. *Baltimore & O. R. Co.*, 167 F.2d 54, 66 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948).

In this case the jury was requested to return a special verdict on the question whether Pan Am engaged in wilful misconduct. Even though the jury's responsibility was limited to finding the facts, the trial court, over objection, instructed the jury on the legal consequences that would flow from its findings. Thus, the jury was told that its finding of fact would determine whether or not plaintiff's damages would be limited in accordance with international law. The court of appeals affirmed and concluded that a district court has broad discretion in instructing juries under Rule 49(a). This Court should grant review to determine whether, pursuant to the text of Rule 49(a),[33] the trial judge has broad discretion to

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[33] Rule 49(a) states in part: "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as *may be necessary* to enable the jury to make its findings upon each issue." (Emphasis added.)

inform the jury of the legal effects of its special verdict findings or whether the court's explanations should be limited to those that the judge explicitly finds "may be necessary" to enable them to make their findings.[34]

The court below observed that, "[t]he circuits are split on the question of whether a district judge abuses his discretion when he informs the jury of the effect of its answers to special verdict interrogatories." 871 F.2d at 815, App. 4a. The Fifth Circuit is in full accord with the court below on this issue.[35] See *Perricone* v. *Kansas*

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[34] One cannot reasonably claim that it was "necessary" in this case to inform the jury of the legal effects of their findings in order to enable them to make those findings. The only reason furnished by the district court, and repeated by the court of appeals, is the fear that the jury might leap to an incorrect conclusion respecting the legal effect of its findings if not so instructed. Tr. May 12, 1986, at 3-10, esp. 5-6, App. 85a-89a; 871 F.2d at 815, App. 5a-6a. But this concern is implausible. With the plaintiffs contending that Pan Am was guilty of wilful misconduct and Pan Am contending that it was not, there was no way that a jury could think that a finding of wilful misconduct would hurt plaintiffs.

To be sure, the court of appeals also stated: "Since the jury was charged with deciding whether Pan Am gave the passengers adequate notice of the damages limitation of the Warsaw Convention, the jury obviously had to be informed about the limitation." 871 F.2d at 815, App. 5a. That rationale, however, overlooks Pan Am's position from the beginning of this case—namely, that the adequate notice issue should not have been in the case at all. While the court below did not reach the issue, Pan Am's position was clearly correct in view of this Court's ruling in *Chan* v. *Korean Air Lines, supra,* that "the Warsaw Convention does not eliminate the limitations on damages for passenger injury or death as a sanction for failure to provide adequate notice of that limitation." 109 S.Ct. at 1684. Hence, the erroneous decision to allow the plaintiffs to raise a claim of inadequate notice cannot be used to defend the trial judge's informing the jury of the legal effect of its findings.

[35] The court below also cited *Vinieris* v. *Byzantine Maritime Corp.*, 731 F.2d 1061, 1065 (2d Cir. 1984), but the decision in that case was based in large part on the court's determination that the jury had to understand the legal effect of its answers in order to evaluate the testimony of the principal witnesses in the case,

City Southern Ry. Co., 704 F.2d 1376, 1378 (5th Cir. 1983).

On the other hand, four circuits do not agree. See *Thedorf* v. *Lipsey*, 237 F.2d 190, 193 (7th Cir. 1956) ("Under Rule 49(a), . . . the trial judge has the responsibility of applying appropriate legal principles to the facts found by the jury. . . . In such a situation the jury is not entitled to information concerning the legal principles which the judge will apply to their findings."); *Gullett* v. *St. Paul Fire & Marine Ins. Co.*, 446 F.2d 1100, 1105 (7th Cir. 1971) ("The purpose of a special verdict is to concentrate the jury's attention exclusively upon the fact questions put to them."); *Ratigan* v. *New York Cent. R. Co.*, 291 F.2d 548, 554 (2d Cir.), *cert. denied*, 368 U.S. 891 (1961) ("As a matter of federal procedure it was unnecessary and improper also to submit questions containing the conclusions of law to be drawn from the findings of fact."); *Millard* v. *Municipal Sewer Auth.*, 442 F.2d 539, 541 (3d Cir. 1971) ("not necessary" to instruct jury on legal effects); *Cate* v. *Good Bros.*, 181 F.2d 146, 149 (3d Cir.), *cert. denied*, 340 U.S. 826 (1950) ("The jury did not require information or guidance concerning the legal principles which the judge would apply to their findings."); *Walther* v. *Omaha Public Power District*, 412 F.2d 1164, 1170 (8th Cir. 1969) ("When a special verdict is used, the court need give the jury only such explanation and instructions as may be

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the employer's captain and the plaintiff. Thus, instruction on the legal effect may have been necessary.

With respect to a somewhat different issue, an opinion by then Circuit Judge Blackmun rejected a claim that instructions were improper when, even though the jury was not informed of the legal effect of its finding, it might have been able to infer the legal effect of its findings from the judge's charge. *Lowery* v. *Clouse*, 348 F.2d 252, 259-61 (8th Cir. 1965). In this case, the jury obviously would have inferred which side would benefit from a finding of wilful misconduct, but it would have been unable to determine the legal effect of its findings on plaintiffs' recovery unless so informed.

necessary to enable the triers of fact to make intelligent findings.").

Apart from the split in the circuits, the question presented has intrinsic importance to the proper functioning of the jury system and the enforcement of laws and treaties that do not enjoy popular support. Informing the jury of the legal effects of its findings when that is not "necessary" vitiates the advantages of a special verdict—*i.e.*, separating the jury's fact-finding from its prejudices as to who ought to prevail—and provides ample opportunity for the "jurors' cruder prejudices" to determine their findings. Similarly, informing the jury of the effect of unpopular laws and treaties, as this case shows, constitutes an invitation for the jury to nullify the law or treaty.

CONCLUSION

A writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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July 28, 1989

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APPENDIX

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UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 86-6453

IN RE AIRCRASH IN BALI, INDONESIA.

JOHN P. CAUSEY, JR., individually and as Executor of the Estate of JOHN P. CAUSEY, SR., and as Administrator with will annexed of the Estate of VIRGINIA D. CAUSEY, *et al.*, *Plaintiffs-Appellees,*

v.

LEE B. ZINKE, *et al.*, *Defendants,*

and

PAN AMERICAN WORLD AIRWAYS, INC., *Defendant-Appellant.*

Argued and Submitted Feb. 7, 1989
Decided March 27, 1989

Appeal from the United States District Court
for the Central District of California

Clinton H. Coddington, Randolph S. Hicks, Richard G. Grotch, Coddington, Hicks & Danforth, Menlo Park, Cal., for defendant-appellant.

Robinson, Robinson & Phillips, Mark P. Robinson, John D. Rowell, Los Angeles, Cal., for plaintiffs-appellees Causey.

Nicholas R. Allis, Butler, Butler & Osborne, James G. Butler, Los Angeles, Cal., for plaintiffs-appellees Ryder.

Before FLETCHER, PREGERSON and LEAVY, Circuit Judges.

PER CURIAM:

This case involves the crash of Pan Am Flight 812 in Bali on April 22, 1974 in which the crew and all the passengers were killed. Pan American World Airways, Inc. (Pan Am) appeals an adverse jury verdict claiming numerous trial errors in evidentiary rulings and instructions and comments to the jury. We affirm.

I

The plaintiffs are the representatives of three deceased passengers—John Causey, Virginia Causey, and Wilson Ryder. According to the plaintiffs, the crash into a mountain side occurred because the pilot and his crew failed to respond to signals warning them of their dangerous location. At the end of the first trial, the jury found that Pan Am was liable for negligence, but not willful misconduct. The district court, holding that the limitations of the Warsaw Convention ("the Convention") did not apply, entered judgment for the full amount of the jury damage award.

On appeal, we held that the district court erred in ruling that the Convention did not apply in this case. We also held that the pilot, Captain Zinke's proficiency records were improperly excluded. We remanded for a second trial on two limited issues: (1) whether there was willful misconduct of corporate management or the crew; and (2) whether Pan Am had complied with the pas-

senger notice requirements of the Convention.[1] *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1313 (9th Cir.1982).

The same district judge presided over the first and second trials. At the end of the second trial, the jury returned answers to special interrogatories stating that: (1) Captain Zinke and the other members of the crew were not liable for willful misconduct; (2) Pan Am's management was liable for willful misconduct in entrusting Flight 812 into the care of Captain Zinke; (3) Pan Am's passenger tickets contained an adequate warning of the Convention's damages limitation; and (4) Pan Am failed to display signs warning of this limitation. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II

Pan Am argues that the jury instructions on willful misconduct were erroneous. "In reviewing jury instructions, the court must consider whether the instructions as a whole were misleading or inadequate to guide the jury's determination." *United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir.1983). In deciding whether the jury was misled, the court should also consider the guidance to the jury provided by the verdict form. *See Boggs v. Lewis*, 863 F.2d 662, 666 (9th Cir.1988) ("[t]his court reviews the jury instructions and the verdict form together to determine whether the jury was misled").

We have reviewed the jury instructions and the verdict form used in this case and conclude that the jury was not misled. Although there is some merit to Pan Am's contention that the trial judge incorrectly substituted the word "or" for the word "and" in one of the

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[1] The Convention limits damages in airline crashes to $75,000 per passenger except where the crash was the result of willful misconduct or where the passenger was not given adequate notice of the Convention's damages limitation.

instructions regarding willful misconduct, the judge's other instructions on willful misconduct and the verdict form were adequate to communicate to the jury the requirements for a finding of willful misconduct.

III

Pan Am next argues that the judge's improper remarks influenced the jury's finding that Pan Am engaged in willful misconduct. We will reverse on the basis of a judge's improper remarks if the judge "expresses [his] opinion on an ultimate issue of fact in front of the jury or [argues] for one of the parties." *Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525, 531 (9th Cir.1986). *See also Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1289 (9th Cir.1984) (noting that "[v]ery few cases outside of the criminal law area support an appellate finding of judicial misconduct during trial"). Pan Am has failed to meet its burden of showing that the district judge expressed his opinion about the ultimate issues in this case or argued on behalf of the plaintiffs. *See also Maheu v. Hughes Tool Co.*, 569 F.2d 459, 471 (9th Cir.1978); *Shad*, 799 F.2d at 531 ("In order to aid the jury in reaching a just conclusion, it is within the trial court's discretion to call attention to evidence it believes important.").

IV

Pan Am argues that the district court erred in informing the jury of the consequences of a finding of willful misconduct. The judge told the jury that, if the jury found against the plaintiffs on the issue of willful misconduct, the plaintiffs would be limited to the amount of damages permitted by the Warsaw Convention.

The circuits are split on the question of whether a district judge abuses his discretion when he informs the jury of the effect of its answers to special verdict interrogatories. In *Vinieris v. Byzantine Maritime Corpora-*

tion, 731 F.2d 1061, 1065 (2d Cir.1984), the Second Circuit noted that "the theory . . . that juries should not be informed of the legal effect of their answers in Rule 49(a) cases . . . has been the subject of both judicial and scholarly criticism," and reversed in part because the trial court failed to inform the jury of "how large a financial stake plaintiff had in the outcome of the case." The Seventh Circuit has adopted the opposite view. *See Gullett v. St. Paul Fire & Marine Insurance Co.*, 446 F.2d 1100, 1105 (7th Cir.1971) ("[t]he purpose of a special verdict is to concentrate the jury's attention exclusively upon the fact questions put to them. Comments on the legal effects of the answers could in an appropriate case have a prejudicial effect of clouding this purpose.").

Our court has suggested by way of guidance to the district court on retrial, in the context of another case, that the district court had not abused its discretion by refusing to inform the jury of the consequences of its answers to interrogatories. *Carvalho v. Raybestos-Manhattan, Inc.*, 794 F.2d 454, 457 n. 2 (9th Cir.1986). We conclude in the case before us that the district court's decision to inform the jury of the effect of a finding of willful misconduct was not an abuse of discretion.

Since the jury was charged with deciding whether Pan Am gave the passengers adequate notice of the damages limitation of the Warsaw Convention, the jury obviously had to be informed about that limitation. *See* Fed.R.Civ.P. 49(a) ("[t]he court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings on each issue"). If the jury had not been informed of the connection between the plaintiffs' arguments that Pan Am committed willful misconduct and the damages limitation, the jury would have deduced a connection on its own and it might have been erroneous. The district judge did not abuse his dicretion

when he decided to eliminate the risk that the jury would deduce an inaccurate connection between a finding of willful misconduct and the damages limitation. *See* 9 Wright & Miller, Federal Practice and Procedure § 2509, at 513 (1971) ("an attempt to keep the jury in the dark as to the effect of its answers is likely to be unavailing, and there is always the danger that the jury will guess wrong about the law, and may shape its answers to the special verdicts, contrary to its actual beliefs, in a mistaken attempt to ensure the result it deems desirable").

V

Pan Am next contends that the admission of the Hudson and Thomas reports constituted reversible error. The Hudson report is a Federal Aviation Administration ("FAA") report on Pan Am's safety record and procedures, which was commenced shortly after the Bali crash; the Thomas report is a Pan Am report on Pan Am's safety record and problems, which was apparently completed just before the Bali crash.

The standard of review for a district court's evidentiary rulings is deferential. "A trial court has broad discretion to admit or exclude evidence, and we review its decision only for an abuse of that discretion. Even if there is error, reversal is appropriate only if we can say that the error affected the substantial rights of the parties." *In re Aircrash in Bali*, 684 F.2d at 1313 (citation omitted).

The Hudson report was properly admitted pursuant to Fed.R.Evid. 803(8)(C), which creates a hearsay exception for public documents. Contrary to Pan Am's assertions, the Hudson report was not inadmissible under Rule 803(8)(C) simply because it includes evaluative or normative findings. *See Beech Aircraft Corp. v. Rainey*, —— U.S. ——, 109 S.Ct. 439, 445-50, 102 L.Ed.2d 445 (1988); *Jenkins v. Whittaker Corporation*, 785 F.2d 720,

726 (9th Cir.1986) ("[c]onclusions and opinions do not render reports *ipso facto* inadmissible"). Further, Pan Am has failed to demonstrate that the report was untrustworthy or unduly prejudicial.

Pan Am argues that the district court erred in admitting the Thomas report pursuant to Rule 801(d)(2)(D). This rule provides that statements which are not hearsay include admissions of a party opponent and defines such admissions as "a statement by [the party's] agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Since all but one of the eight authors of the report were experienced Pan Am crew members, we hold that the Thomas report was admissible as an admission of Pan Am employees concerning matters within the scope of their employment. As with the Hudson report, Pan Am has failed to support its contention that the Thomas report was unduly prejudicial.

Pan Am also argues that the Hudson report and the Thomas report in effect were subsequent remedial measures and were thus inadmissible under Fed.R.Evid. 407, which states that measures taken after an event which would have made the event less likely to occur are not admissible to prove culpable conduct. The purpose of Rule 407 is to ensure that prospective defendants will not forego safety improvements because they fear that these improvements will be used against them as evidence of their liability.

Since the Thomas Report, a comprehensive report many months in the making, was dated only one day after the Bali crash, it is patently clear it was not a response to the crash. We find no basis for treating the Thomas Report as a subsequent remedial measure.

Although the question is closer, we conclude the Hudson Report was not a subsequent remedial measure within the meaning of Rule 407. The Hudson investi-

gation began five days after the Bali crash, and the report is dated June 13, 1975 (about 14 months after the crash). However, the Hudson report does not qualify as a subsequent remedial measure because it was prepared by the FAA without the voluntary participation of Pan Am.[2]

A number of courts outside this circuit have adopted the view that Rule 407 applies only to subsequent remedial measures by the defendant. *See, e.g., Koonce v. Quaker Safety Products & Mfg. Co.*, 798 F.2d 700, 719-20 (5th Cir.1986). The purpose of Rule 407 is not implicated in cases involving subsequent measures in which the defendant did not voluntarily participate. Where the defendant has not voluntarily participated in the subsequent measure at issue, the admission of that measure into evidence does not "punish" the defendant for his efforts to remedy his safety problems. In this case, Pan Am's management, although to be commended for its cooperation, nonetheless was legally obligated to cooperate with the FAA's investigation. *See* 14 C.F.R. § 13.3. Thus, the admission of the Hudson report did not penalize Pan Am for its voluntary participation in safety measures.[3]

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[2] We need not address the issue of whether post-accident studies generally qualify as remedial measures under Rule 407. Two courts have held that "subsequent remedial measures" include "only the actual remedial measures themselves and not the initial steps toward ascertaining whether any remedial measures are called for." *Fasanaro v. Mooney Aircraft Corp.*, 687 F. Supp. 482, 487 (N.D. Cal. 1988); *Rocky Mountain Helicopters v. Bell Helicopters Textron*, 805 F.2d 907, 918 (10th Cir. 1986) (same). *But see Alimenta, Inc. v. Stauffer*, 598 F. Supp. 934, 940 (N.D. Georgia 1984) (post-event accounting report in civil fraud suit is a subsequent remedial measure under Rule 407).

[3] In its brief, Pan Am also objects to the admission of the Indonesian report. At oral argument, Pan Am's counsel conceded that Pan Am was no longer pursuing its objection to the Indonesian report because that report addresses only the culpability of Flight 812.

VI

Pan Am's final argument is that the district court's instruction on the Convention's notice requirement was erroneous. Under the Warsaw Convention, the Convention's damages limitation does not apply if the defendant committed willful misconduct *or* if the passengers in question received inadequate notice. Since we uphold the jury's finding that Pan Am's management committed willful misconduct and therefore hold that the Convention's damages limitation is inapplicable in this case, we need not address Pan Am's challenges to the notice instruction.

CONCLUSION

We affirm the district court.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file date on the attached decision of the Court.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 79-3341, 78-3761—78-3763

IN RE AIRCRASH IN BALI, INDONESIA ON APRIL 22, 1974

JOHN P. CAUSEY, JR., ETC., *et al.*,
Plaintiffs-Desigated Appellants,

v.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants-Designated Appellees.

SIMONE RYDER, ETC., *et al.*,
Plaintiffs-Desigated Appellants,

v.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants-Designated Appellees.

MARGARET G. JOHNS, ETC., *et al.*,
Plaintiffs-Designated Appellants,

v.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants-Designated Appellees.

Argued and Submitted Oct. 6, 1980

Decided Aug. 24, 1982

Appeal from the United States District Court
for the Central District of California

Clinton H. Coddington, Tucker & Coddington, Los Angeles, Cal., Mark H. Gallant, Washington, D.C., for American World Airways.

James G. Butler, Los Angeles, Cal., for Ryder.

Mark P. Robinson, Los Angeles, Cal., for Causey.

Nicholas R. Allis, Geneva, Switzerland, for amicus.

Withdrawn and resubmitted—January 29, 1982.

Before FLETCHER and PREGERSON, Circuit Judges, and SOLOMON,* District Judge.

FLETCHER, Circuit Judge:

These suits arise out of an aircrash in Bali, Indonesia, on April 22, 1974, in which plaintiffs' decedents and 104 other persons were killed. A jury found defendant Pan American World Airways, Inc. (Pan Am) negligent, and awarded damages in the amount of $300,000 to the Causey plaintiffs and $651,500 to the Ryder plaintiffs. The district court declined to reduce the verdicts to the limits imposed by the Warsaw Convention, October 12, 1929, 49 Stat. 3000 (1934), 137 L.N.T.S. (1929) (arts. 17 & 22).

Defendant-designated appellee Pan Am appeals from the trial court's ruling that the Warsaw Convention is not applicable, and plaintiffs-designated appellants cross-appeal to attack evidentiary rulings made by the court in the course of trial.

I

BACKGROUND

A. The Warsaw Convention

The Warsaw Convention is a multilateral treaty. The Convention was drafted in 1929 and adhered to by most countries whose airlines have international routes. The United States adhered to the treaty in 1934. 49 Stat. 3000 (1934). The Convention standardizes, among the contracting countries, the documentation required for passengers and cargo on international [1] flights, *id.* at arts. 3, 4, 5-16, and makes uniform various procedural rules relating to claims for loss and damage, *id.* at art. 26-31. It also limits the liability of air carriers in the event of accident or loss, *id.* at art. 22.

The Convention creates an express presumption that any accident is the result of carrier negligence unless the carrier can prove that all necessary measures were taken to avoid damages, or that it was impossible to take such measures. *Id.* at art. 17, 20. The Convention excepts from the limit on the carrier's liability, injury or death

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[1] The provisions of the Warsaw Convention apply only to "international transportation," which is defined in the Convention as

> any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in transportation or a transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

Art. 1(2), Warsaw Convention, Oct. 12, 1929, 49 Stat. 3000 (1934), 137 L.N.T.S. (1929).

caused by the carrier's "willful misconduct." *Id.* at art. 25. The Convention permits the passenger and the carrier to contract for a higher limit on liability, *id.* at art. 22, but invalidates any contract that purports to lower or remove the carrier's liability, *id.* at art. 23. Other provisions require the application of forum law to certain questions of procedure, *id.* at art. 28(2), contributory negligence, *id.* at art. 21, and to the determination of who has the right to bring suit and what their respective rights are, *id.* at art. 24(2). Article 28 regulates venue, and article 29 sets the statute of limitations for actions brought under the Convention. Other technical provisions are not relevant here.

Because of dissatisfaction with certain provisions of the Warsaw Convention, particularly the low limit set for personal injury or death,[2] an international conference convened at The Hague in September, 1955, for the purpose of amending the Convention. The agreement eventually raised the limit on carrier liability for injury from $8,300 to roughly $16,600, and amended the language of Article 25 relating to "willful misconduct." Hague Protocol, September 28, 1955, 478 U.N.T.S. 371; *see* Lowenfeld and Mendelsohn, The United States and the Warsaw Convention, 80 Harv.L.Rev. 497, 504-09 (1967) [hereinafter cited as Lowenfeld and Mendelsohn]. The United States has not adhered to the Hague Protocol, at least in part because the limit on liability is still too low to satisfy critics of the Warsaw Convention. Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 509-16, 532-46; *see* Senate

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[2] Article 22 sets a limit of 125,000 French francs for injury to passengers, and 250 francs per kilogram of goods or checked baggage. On the date of the accident, the limitation for personal injury in U.S. dollars was approximately $10,000. In the Matter of Warsaw Convention Liability Limitations as Expressed in U.S. dollars, CAB Order 74-1-16 (Jan. 3, 1974). However, the treaty limitation is expressed in gold "Poincare" francs, and what the present value of the limitations may be, given the increased dollar value of gold, is an open question.

Comm. on Foreign Relations, Hague Protocol to Warsaw Convention, S. Exec. Rep. No. 3, 89th Cong., 1st Sess., and appendix (1965). Instead, in November, 1965, the United States denounced the Warsaw Convention, effective May, 1966 (the Convention requires six months' notice of withdrawal). 50 Dep't State Bull. 923 (1963). In an accompanying press release, the United States offered to withdraw its denunciation before it became effective if, prior to May, 1966, an international agreement could be reached that would substantially raise the limits on liability. *Id.* at 924.

In response, in 1966, international air carriers reached a private agreement, with the participation of the Department of State, the Civil Aeronautics Board, and the International Air Transport Association. Montreal Agreement, CAB Order No. E-23680, 31 Fed.Reg. 7302 (1966). The Montreal Agreement provides that the signatory airlines accept absolute liability for injury to passengers, up to a limit of $75,000 per passenger. The Agreement has the status of a special contract under article 22 of the Warsaw Convention. It applies to international transportation as defined in the Warsaw Convention, on airlines signatory to the agreement, provided that the intended journey includes a point of departure or agreed stopping place in the United States. Montreal Agreement § 1, 31 Fed.Reg. 7302.

B. Proceedings Below

The plaintiffs in the case at bar challenged the application, validity, and constitutionality of the Warsaw Convention, the Hague Protocol and the Montreal Agreement. They also attempted to avoid the liability limitations by showing "willful misconduct" on the part of Pan Am. The jury found no willful misconduct. The Causey plaintiffs, who would have been entitled to the benefit of the Montreal Agreement's provision of strict liability up to a maximum of $75,000, chose instead to attack the Agreement and go to trial on negligence theories.

After the jury returned its verdict, the trial court ruled that under California law a decedent cannot by contract compromise his survivor's right to wrongful death recovery. Hence the contractual limitations imposed by the Warsaw Convention and subsequent agreements could have no operation. *In re Air Crash in Bali, Indonesia*, 462 F.Supp. 1114, 1126 (C.D.Cal.1978). The court thus never reached plaintiffs' challenge to the constitutionality of the Convention.

II

ANALYSIS

A. The District Court's Decision

The district court, in refusing to apply the limitations on liability imposed by the Warsaw Convention, relied on California law. It reasoned that the Warsaw limitation is based on a contract between the passenger and the carrier, because (1) the Convention requires delivery of the ticket and written notice to the passenger of the limitation on liability before the limitation can be invoked, 462 F.Supp. at 1119-20; *see Warren v. Flying Tiger Line*, 352 F.2d 494 (9th Cir. 1965); (2) the passenger and the carrier may, by contract, agree to a higher limit on liability, 462 F.Supp. at 1120; and (3) the applicability of the Convention depends on the place of departure and the destination stated in the contract of carriage between the parties, *id.* at 1119. California does not permit a decedent to compromise by contract his survivor's right to wrongful death recovery. *Id.* at 1117; *See Robison v. Leigh*, 153 Cal.App.2d 730, 315 P.2d 42 (1957); *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, 167 P. 513 (1917). Any limitation based on contract with the decedent, therefore, can have no application against survivors under California law. The court then examined the federal public policy behind the Warsaw Convention. Finding that federal policy does not require broad application of the Convention's limitations, 462 F.Supp. at

1124-26 (citing 1 L. Kreindler, *Aviation Accident Law*, § 11.01(2), (5) (1975)), the court entered judgment on the jury's verdict for plaintiffs.[3]

B. Application of California Law

1. Choice of Law

The district court's decision presents two threshold questions: (1) Was the proper choice of law made? (2) Does the Warsaw Convention preempt local law in respect to limitation of liability for wrongful death? The Warsaw Convention requires recourse to local law to determine certain issues. *See* page 3, *supra*. This is not disputed, but Pan Am challenges the court's choice of California law. The jurisdiction of the federal district court in California is not challenged. It is proper both for purposes of diversity jurisdiction and under the jurisdictional provisions of the Warsaw Convention. Pan Am contends, however, that either Virginia law or the law of New South Wales, Australia, should be applied. The Causey decedents were residents of Virginia, the Ryder decedent a resident of New South Wales. Either of these states' laws, apparently, would impose a low dollar limit on wrongful death recovery even in the absence of the Warsaw Convention.

Pan Am first argues that Virginia law should govern the Causey case because the Causeys first filed in Virginia and then transferred the action to California. See *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S.Ct. 805, 820, 11 L.Ed.2d 945 (1964). We find this argument unpersuasive since the Causey plaintiffs filed a second action in California, and it is on that action that the Causeys chose to go to trial. The transferred case was dismissed.

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[3] Because the court held the Convention limitations inapplicable to the present suit, it did not reach the issues of notice and ticket delivery. *See* note 13, *infra*.

Since both the Causey and Ryder cases were filed in California, California's choice of law rules must be applied. *Klaxon v. Stentor Electric Co., Inc.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). Plaintiffs and Pan Am appear to agree on the substance of California's choice of law rule, but disagree on its application to the facts of this case. As both parties agree, California has adopted the "governmental interest" approach to questions of conflicts of laws. *Hurtado v. Superior Court*, 11 Cal.3d 574, 522 P.2d 666, 114 Cal.Rptr. 106 (1974). Under *Hurtado*, California will decline to apply its own law to a case brought in California only if it is shown that another state has a greater interest in having its law applied. *Id.* at 581, 522 P.2d at 670, 114 Cal.Rptr. at 110. The instant case presents a classic example of a "false conflict," *i.e.*, a case in which more than one law could be applied, but in which only one state has any real interest in seeing its law applied. *Id.* at 581 & n.3, 522 P.2d at 670 & n.3, 114 Cal.Rptr. at 110 & n.3. As California has recognized, a limitation on wrongful death recoveries is intended to protect defendants from large verdicts. *Id.* at 583-84, 522 P.2d at 671, 114 Cal.Rptr at 111. It is not an attempt to limit the compensation of plaintiffs. Pan Am has its principal place of business in California; plaintiffs reside in Virginia and Australia. Neither Virginia nor Australia has an interest in protecting a California defendant from wrongful death awards and California has chosen not to protect its resident defendants.[4] We conclude therefore that the trial court was correct in applying California law.

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[4] We also note that Virginia apparently does not have an interest in limiting wrongful death recoveries. Although Virginia law placed a $25,000 limit on dollar recoveries at the time the Causey case was filed, the Virginia legislature had already voted to repeal the law. Virginia now places no limit on recovery. *Compare*, Va. Code Ann. § 8-636 (Cum. Supp. 1973) *with* Va. Code Ann. § 8.01-52 (Cum. Supp. 1974).

2. Preemption

The district court apparently did not consider whether the Warsaw Convention preempts the application of California's rule regarding the limitation by contract of wrongful death recoveries.

Although the district court may have concluded that the Warsaw Convention did not expressly preempt California law, it did not consider whether the application of California law would conflict with the Congressional scheme embodied in the Convention. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 93 S.Ct. 1854, 1859, 36 L.Ed.2d 547 (1973). This is clearly not a case in which Congress intended to preempt all state legislation in the field, since the Convention specifically requires the application of local law to some issues. *See* page 3, *supra*. However, federal law may also preempt the application of state law where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

Congress ratified[5] the Warsaw Convention in 1934. The Convention's application is to international air transportation. Its purposes are two-fold: providing uniformity in respect to documentation and certain procedural matters, and imposing limitations on liability. When the Convention was transmitted to the Senate for ratification, it was accompanied by a letter from then-Secretary of State Cordell Hull, which stated in part:

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[5] We reject plaintiffs' claim that the Warsaw Convention is not a valid treaty of the United States because not ratified. The Constitution requires the Senate's "consent" to a treaty, art. II § 2. The consent appears at 78 Cong. Rec. 11,582 (1934). Were that in error, the Senate has had forty-seven years in which to disclaim its "consent". That it has not done so, we find persuasive.

> It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transport, as such limitation will afford the air carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there will eventually be a reduction of operating expenses for the carrier and advantages to the travelers and shippers in the way of reduced transportation charges.

S.Doc.Exec.G., 73d Cong., 2d Sess. 3-4 (1934). Although there were no hearings and no debate in the Senate at the time the Convention was ratified, Secretary Hull's letter and subsequent history make it clear that the limitation on liability was an important feature of the Convention. *See, e.g.*, Hearings on the Hague Protcol to the Warsaw Convention Before the Senate Committee on Foreign Relations, 89th Cong., 1st Sess. 49-54 (1965); S.Rep. 2032, 88th Cong., 1st Sess. (1963); H.R. 8386, 88th Cong., 1st Sess. (1963); Senate Comm. on Foreign Relations, Hague Protocol to Warsaw Convention, S. Exec. Rept. No. 3, 89th Cong., 1st Sess. (1965). *See generally*, Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 509-16, 532-46.

Whatever its benefits were in 1934, the district court noted that the low limitation on liability cannot be justified today by the conditions that existed in 1934, 462 F.Supp. at 1124-26. The court observed that the airline industry is no longer in its infancy: "[t]he pioneering conditions and the lack of technical advancement and passenger safeguards which faced the industry when Warsaw was adopted have been supplanted by a technologically and commercially mature industry." *Id.* at 1125. Unfortunately, we know of no doctrine that would allow us to examine congressional enactments to see if they still serve

the purpose for which they were designed. If the Warsaw Convention was intended to preempt state law in the area of liability for wrongful death on international flights, we may not avoid preemption by substituting our judgment for that of Congress to hold that the Convention has outlived its usefulness. Furthermore, Congress has had ample opportunity to reconsider the wisdom of the Convention, but it has yet to effect any changes. *See, e.g.* Hearings on the Hague Protocol to the Warsaw Convention Before the Senate Committee in Foreign Relations, 89th Cong., 1st Sess. (1965).

The application of California law suggested here necessarily conflicts with the congressional scheme. Neither uniformity nor an effective limitation of the airlines' liability could be achieved if state law doctrines could be invoked to circumvent the application of the limitation. Accordingly, we hold that California law is preempted by the Warsaw Convention to the extent that California law would prevent the application of the Convention's limitation on liability. *See Bradfield v. TWA*, 88 Cal.App.3d 681, 687, 152 Cal.Rptr. 172, 175 (1979).

III

CONSTITUTIONALITY OF THE WARSAW CONVENTION

Plaintiffs contend that if California law is preempted by the Warsaw Convention, the limitation on liability is unconstitutional.[6]

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[6] Pan Am and the United States argue that the Ryder plaintiffs, residents of Australia, have no standing, or limited standing, to raise constitutional objections, citing, *e.g., Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960). The fifth amendment applies to "persons," however, which certainly includes persons who have a valid claim over which our federal courts have jurisdiction. See *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886). Although there are undoubtedly

Although courts are not often called upon to review the constitutionality of treaty provisions, there is no doubt that the power to make treaties is circumscribed by substantive provisions of the Constitution, and that the courts are competent to pass on the constitutionality of treaties. *Reid v. Covert*, 354 U.S. 1, 16-19, 77 S.Ct. 1222, 1230-1231, 1 L.Ed.2d 1148 (1965); *see Geofroy v. Riggs*, 133 U.S. 258, 267, 10 S.Ct. 295, 297, 33 L.Ed. 642 (1898). *See generally*, W. Cowles, Treaties and Constitutional Law: Property Interferences and Due Process of Law (1941); L. Henkin, Foreign Affairs and the Constitution 205-24 (1972). Treaties, under the Constitution, are the supreme law of the land. U.S.Const. Art. IV. As such, treaty provisions which create domestic law have the same effect as legislation, and supersede previous conflicting legislation. By the same token, such provisions are subject to the same substantive limitations as any other legislation. *Reid v. Covert*, 354 U.S. at 16-18, 77 S.Ct. at 1230-1231. Were this not so, a constitutional limitation on governmental power could be circumvented by means of a treaty, although the same objective could not be accomplished through legislation. *Id.*

Of course, statutes are entitled to a presumption of constitutionality, *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83, 98 S.Ct. 2620, 2635, 57 L.Ed.2d 595 (1978); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976), and treaties are entitled to the same deference. Furthermore, a court, in the process of reviewing treaty provisions, must studiously avoid imposing its own view ~~of foreign~~ policy objectives and must accept the foreign policy formulations of the executive and legisla-

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constitutional provisions the protection of which nonresident aliens may not claim, *see Johnson v. Eisentrager*, 339 U.S. 763, 784-85, 70 S.Ct. 936, 946-47, 94 L.Ed. 1255 (1950), the fifth amendment surely does not permit in a case such as this one, the application of different rules of decision to residents and nonresidents suing on the same cause of action in the same court.

tive branches. *See Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C.Cir.1979). Nonetheless, there are ends which may not be accomplished either by statute or by treaty, however compelling the foreign policy interests may be. We conclude that the treaty at issue here must withstand essentially the same tests as would domestic legislation against a claim that it denies rights guaranteed by the Constitution.

A. Plaintiffs' Constitutional Arguments

Plaintiffs make three constitutional challenges to the limitation: 1) that it is so arbitrary and unreasonable as to deprive them of substantive due process; 2) that it deprives them of equal protection of the laws; and 3) that it impermissibly burdens their constitutional right to travel.

The first two arguments are very similar to those made by the plaintiffs in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed. 2d 595 (1978). That case dealt with the constitutionality of the Price-Anderson Act, 42 U.S.C. § 2210 (1976), which sets a limit on the maximum liability for injury resulting from nuclear power plant accidents.

The plaintiffs in *Duke Power* claimed that the amount of the limitation was arbitrary and unreasonable, depriving them of due process and equal protection. The Court first held that the Price-Anderson Act, as an economic regulation under the Commerce Clause, would not violate due process unless arbitrary or irrational. *Id.* at 83, 98 S.Ct. at 2635. After reviewing the need for limitation of liability, and examining the procedural provisions of the Act, the Court concluded that it was not unconstitutional. *Id.* at 86-87, 98 S.Ct. at 2637. We conclude that article 22 of the Warsaw Convention, like the Price-Anderson Act, is an economic regulation which would be constitutional under the Commerce Clause unless arbitrary or unreasonable.

Plaintiffs' third argument is that the severe limitation on recovery for wrongful death impermissibly burdens their decedents' right to travel. International travel, like interstate travel, is a fundamental right. *Zemel v. Rusk*, 381 U.S. 1, 13-14, 85 S.Ct. 1271, 1279, 14 L.Ed.2d 179 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06, 84 S.Ct. 1659, 1663-64, 12 L.Ed.2d 992 (1964); *Kent v. Dulles*, 357 U.S. 116, 126, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204 (1958). Restrictions on international travel, therefore, must be carefully tailored to serve a substantial and legitimate government interest. *Aptheker*, 378 U.S. at 507-08, 84 S.Ct. at 1664-65. The imposition of a penalty on the exercise of the right to travel is the constitutional equivalent of a direct restriction. *See Shapiro v. Thompson*, 394 U.S. 618, 641-42, 89 S.Ct. 1322, 1335, 22 L.Ed.2d 600 (1969). Although a right-to-travel challenge to the Warsaw Convention involves the assertion by survivors of their decedents' right to travel, this may be one of the cases in which constitutional rights can be successfully protected only if interested third parties are permitted to raise them. *See Griswold v. Connecticut*, 381 U.S. 479, 481, 85 S.Ct. 1678, 1679, 14 L.Ed.2d 510 (1965). Surely penalties that would be unconstitutional if imposed on the traveller himself cannot be validly imposed on his survivors, simply because they were not the ones who sought to exercise the right.

In support of their constitutional arguments, plaintiffs allege the following facts. Plaintiffs assert that, whatever the need for limitation of airline liability might have been in 1934, the need no longer exists and therefore cannot support the treaty provisions before us. The airline industry is no longer in its infancy. The fatality rate has dropped from 45 per 100 million passenger miles in 1925, to .55 per 100 million passenger miles in 1965. ICAO, Annual Report (1965). The statistical materials assembled for the proceedings leading up to the Montreal Agreement suggest that the increased cost of insurance if the

Warsaw limitation were removed would be insignificant. *See* ICAO, 2 *Special ICAO Meeting on Limits for Passengers Under the Warsaw Convention and the Hague Protocol* 72-173 (1966); Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 566-67. Furthermore, it appears that the cost to airline of additional insurance would be less than the cost to individual passengers of purchasing trip insurance. *See* 1 L. Kreindler, Aviation Accident Law § 11.01[5] (1975); Lowenfeld and Mendelsohn, 80 Harv. L.Rev. at 560-61. There is no allegation that domestic airlines, which are not protected by the Warsaw Convention limitations or comparable legislation, have been unable to procure insurance. Similarly, no one contends that the additional insurance, if required, would not be available. *Compare Duke Power*, 438 U.S. at 64, 98 S.Ct. at 2625 (potential liability beyond ability of private insurance companies to absorb).

The United States responds that in negotiations over the conditions of international air travel, concessions, particularly as to the limitation of liability, are necessary to gain the cooperation of foreign countries. The United States does not assert any national interest in limiting liability *per se*. In fact, continuing efforts are being made by the United States to raise or dispense with the limitations altogether. *See*, Lowenfeld and Mendelsohn, 80 Harv. L.Rev. 497 *passim;* 1 L. Kreindler, Aviation Accident Law § 12B.01 (1980).

Plaintiffs also argue that the supposed benefits of the Warsaw Convention to some plaintiffs, *e.g.*, the presumption of liability and the venue provisions, are illusory and do not constitute a *quid pro quo* for the liability limitation. *Compare Duke Power*, 438 U.S. at 87-90, 98 S.Ct. at 2637-2639. It has been persuasively argued that, for U.S. plaintiffs at least, the Convention confers no procedural benefits in personal injury suits. *See, e.g.*, Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 516-32; 1 L. Kreindler, Aviation Accident Law § 11.01[5] (1980).

The United States takes issue with this view, and argues that the benefits to plaintiffs may in some cases be significant.

We conclude that plaintiffs' due process and right-to-travel arguments, while substantial, would fail if another remedy were available that would provide them with full compensation. We find that such a remedy is available under the Tucker Act, 28 U.S.C. § 1491, if the liability limitation constitutes a "taking" under the fifth amendment.

B. The Just Compensation Clause

No party to this litigation has argued that the Warsaw Convention limitation constitutes a "taking" that entitles plaintiffs to compensation by the United States under the just compensation clause of the fifth amendment. We raised this issue *sua sponte* and requested supplemental briefs from the parties for the reason that, if compensation is available under the Tucker Act, 28 U.S.C. § 1491, we do not reach the question of whether the Warsaw Convention is unconstitutional.

We do not by this resolution imply that substantive due process and just compensation are completely complementary protections.[7] There are some government regu-

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[7] It has been suggested that one who contests the constitutionality of a law which deprives the claimant of some property interest may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." *Agins v. City of Tiburon*, 24 Cal.3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979). This does not, however, appear to be the law. Four justices of the Supreme Court have stated that "[t]his holding flatly contradicts clear precedents of [the Supreme] Court." *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 1301, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting). At least one other Justice has expressed agreement with this view. *Id.* 101 S.Ct. at 1294 (Rehnquist, J., concurring). Justice Rehnquist agreed with the majority that the *San Diego* case was not

lations for which no adequate compensation could be paid, because they deprive persons of some aspect of life or liberty. In these cases, the regulation may be a violation of substantive due process. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 500-06, 97 S.Ct. 1932, 1936-39, 52 L.Ed.2d 531 (1977); *Roe v. Wade*, 410 U.S. 113, 164, 93 S.Ct. 705, 732, 35 L.Ed.2d 147 (1973). There are cases, however, in which both a deprivation of substantive due process and a taking without just compensation are claimed. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 119, 98 S.Ct. 2646, 2656, 57 L.Ed.2d 631 (1978); *Duke Power*, 438 U.S. at 82, 94 n.39, 98 S.Ct. at 2635, 2641 n.39. Generally, if the loss claimed is compensable, the regulation will not be found unconstitutional. *See Duke Power*, 438 U.S. at 94 n.39, 98 S.Ct. at 2641 n.39. In *Dames & Moore v. Regan*, 453 U.S. 654, 689-90, 101 S.Ct. 2972, 2992, 69 L.Ed.2d 918 (1981), the Supreme Court held that if the executive agreement entered into with Iran to secure the release of American hostages ever effected a taking of the claimants' property, the Tucker Act remedy would be available. Justice Powell, concurring and dissenting,

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appealable for lack of a final judgment, but observed that "I would have little difficulty in agreeing with much of what is said in the dissenting opinion" on the merits. *Id.* Thus, we take it to be the view of the majority of the Supreme Court that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922) (quoted in *San Diego Gas & Electric*, 101 S.Ct. at 1302 (Brennan, J., dissenting)). Thus, not withstanding the view of the California Supreme Court, we assume that the excessive exercise of the government's law-making powers may constitute a "taking" under the fifth amendment, for which just compensation must be paid. *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958).

noted that, "[t]he Government must pay just compensation when it furthers the nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by relatively few persons and subject to the jurisdiction of our courts." *Id.*, 101 S.Ct. at 2993. *See generally*, L. Henkin, Foreign Affairs and the Constitution 259-66 (1972).

We first note that the "treaty exception" to the jurisdiction of the Court of Claims under the Tucker Act, 28 U.S.C. § 1502 (1976), is not a bar to suit by these plaintiffs in the Court of Claims. *See Dames & Moore*, 453 U.S. at 689-90, 101 S.Ct. at 2992. The exception is applicable only where the right asserted is created by or depends for its existence upon some treaty provision. That limitation has been narrowly construed. *See Hughes Aircraft Co. v. United States*, 534 F.2d 889, 902-06 (Ct. Cl. 1976). The right asserted by plaintiffs here arises under California law, not treaty.[8] The Court of Claims would therefore have jurisdiction over any claim of a "taking" of that right.

We next look to whether plaintiffs' wrongful death claims are "property" within the meaning of the just compensation clause of the fifth amendment. Plaintiffs have a right under California law to recover damages caused by the wrongful death of their decedents.[9] There is no question that claims for compensation are property

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[8] It might be argued that if the Warsaw Convention creates a cause of action, as at least one circuit has held, *Benjamin v. British European Airways*, 572 F.2d 913, 918-19 (2d Cir. 1978), the right asserted is "dependent upon" the treaty. *But see Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1258 n.2 (9th Cir. 1977). However, the Convention has never been read to *limit* plaintiffs to a cause of action arising thereunder, but rather to limit the recovery in suits for injury. *See* Warsaw Convention, *supra* note 1, at art. 24.

[9] The right to wrongful death recovery is also a feature of the federal common law, *Moragne v. States Marine Lines*, 398 U.S. 375, 409, 90 S.Ct. 1772, 1792, 26 L.Ed.2d 339 (1970), and its denial the exception, *id.* at 393, 90 S.Ct. at 1783.

interests that cannot be taken for public use without compensation. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 245, 1 L.Ed. 568 (1796); *Gray v. United States*, 21 Ct.Cl. 340, 392-93 (1886). *See also, Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25, 95 S.Ct. 335, 349, 42 L.Ed.2d 320 (1974); *Cities Service Co. v. McGrath*, 342 U.S. 330, 335-36, 72 S.Ct. 334, 337, 96 L.Ed. 59 (1952).[10] We can see no reason why these

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[10] The Supreme Court, in a footnote to *Duke Power*, observed that "[a] person has no property, no vested interest, in any rule of the common law." 438 U.S. at 88 n.32, 98 S.Ct. at 2638 n.32 (quoting *Second Employers' Liability Cases*, 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912)). The cases cited for this proposition, with one exception, dealt with statutes creating, not extinguishing, liability. *Silver v. Silver*, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929), the one exception, dealt with an automobile guest statute, which barred liability. In that case, however, the due process question was not raised, and the statement quoted is pure dictum.

Furthermore, we are not dealing here with a change in a rule of the common law. Plaintiffs are not complaining of a change in law, but of the limitation of an independently existing right under state law. By the same token, plaintiffs in *Dames & Moore* and *Duke Power* held or would hold claims created by the operation of state law. The Constitution does not create property rights; it merely forbids the extinguishment of those rights. The source of property rights is necessarily common law or statute, usually state statute. This is precisely the type of property to which the fifth amendment is addressed, as the Supreme Court implicitly recognized in *Duke Power*, 438 U.S. at 94 n.39, 98 S.Ct. at 2641 n.39.

The Court further observed that "statutes limiting liability are relatively commonplace and have consistently been enforced by the court." *Id.* at 88 n.32, 98 S.Ct. at 2638 n.32. The cases cited for this proposition are most notable for their lack of authority. *Silver v. Silver*, 280 U.S. 117, 50 S.Ct. 57, 75 L.Ed. 221, presented an equal protection challenge to an automobile guest statute. Several states have since decided that *Silver* is no longer good law, and that guest statutes are unconstituional. *E.g., Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974); *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974); *Laakonen v. Eighth Judicial District Court*, 91 Nev. 506, 538 P.2d 574 (1975); *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975). *Providence & New York S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 3 S.Ct. 379, 27 L.Ed. 1038 (1883) involved no constitutional challenge to the limitation of a vessel

plaintiffs' claims are any different, for fifth amendment purposes, from the claims of various creditors against the government of Iran, *see Dames & Moore*, 453 U.S. at 689, 101 S.Ct. at 2992.

Of course, whether or not a particular limitation amounts to a taking is a difficult question. "Takings" cases frequently turn on questions of degree. *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *United States v. Causby*, 328 U.S. 256, 258, 66 S.Ct. 1062, 1064, 90 L.Ed 1206 (1946). We need not decide now whether the Warsaw Convention may effect a taking, because the issue may not arise in this case. The question is properly one for the Court of Claims, when and if the Warsaw Convention limitation is applied to these plaintiffs. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 146-47, 95 S.Ct. 335, 359-60, 42 L.Ed.2d 320 (1974). Although the value of plaintiffs' claims against Pan Am has been established,[11] it has yet to be determined whether the impairment of that claim by the Warsaw Convention would constitute a taking. We hold only (1) that plaintiffs have a right to compensation if their claims have been unreasonably impaired by the treaty, and (2) that the Court of Claims has jurisdiction to make that determination and to enforce the right.[12]

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owner's liability, and the court noted that the limitation dated from "time immemorial." *Id.* at 593, 3 S.Ct. at 388. *Indemnity Ins. Co. of North America v. Pan American Airways*, 58 F.Supp. 338 (S.D.N.Y. 1944), involved a due process challenge to the Warsaw Convention, that was rejected in a single sentence.

[11] We note that the right to just compensation entitles the claimant to the full pecuniary value of his claim. *United States v. Reynolds*, 397 U.S. 14, 15-16, 90 S.Ct. 803, 804-805, 25 L.Ed.2d 12 (1970). Plaintiffs' damages have already been determined by the jury, so the value of their claim is not an issue.

[12] There is no danger that the statute of limitations will have run before plaintiffs can bring a suit in the Court of Claims, because no taking will have occurred until the Warsaw limitation is applied to them, if it ever is.

IV

TRIAL ERRORS

Because we cannot uphold the district court's judgment, the case must be remanded for further proceedings. On remand, Pan Am will be required to prove ticket delivery and adequate notice before the Warsaw limitation could be applied.[13] Additionally, plaintiffs urge on their cross-appeal that the district court erred in not admitting certain training records of the aircraft's pilot, and in not allowing plaintiffs' expert to testify as to the pilot's competence and as to whether Pan Am was negligent in allowing the pilot to command the flight in question. Plaintiffs argue that these errors entitle them to a new trial on the issue of willful misconduct.

We agree that the court's evidentiary rulings were erroneous and reversible because the excluded evidence could have provided the jury with a basis to find Pan Am guilty of willful misconduct. A verdict of willful misconduct would render the Warsaw Convention limitations inapplicable.

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[13] We note that adequate notice to the passenger requires delivery of a ticket to him "in such a manner as to afford him a reasonable opportunity to take self-protective measures." *Mertens v. Flying Tiger Line*, 341 F.2d 851, 857 (2d Cir.), *cert. denied*, 382 U.S. 816, 86 S.Ct. 38, 15 L.Ed.2d 64 (1965). *See also Warren v. Flying Tiger Line*, 352 F.2d 494, 498 (9th Cir. 1965). Inconspicuous and hypertechnical "notice" may not satisfy this requirement. *See Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508, 512-14 (2d Cir. 1966). The current notice required by the CAB informs passengers that recovery "is limited in most cases to proven damages not to exceed U.S. $75,000 per passenger . . ." on trips having an "agreed stopping place in the United States of America," or "in most cases to approximately U.S. $10,000 or U.S. $20,000" on other international trips. CAB Form 263 (Jan. —, 1976). We need not decide here whether the notice required by the CAB is adequate to advise a passenger of the effect of the limitation. What notice was actually given and the manner of its display on tickets is not in the record before us.

A. Exclusion of Evidence

Plaintiffs sought to prove that Pan Am was negligent in entrusting the aircraft to pilot Zinke because Pan Am knew that Zinke was incompetent and on prior occasions had made errors similar to the error that caused the Bali aircrash. As proof, plaintiffs offered pilot Zinke's training records both as independent evidence and as the basis for the opinion of their expert, Captain Cusmano, that the pilot was incompetent and should not have been allowed to fly the flight in question. Captain Cusmano was permitted to give his opinion as to the cause of the accident based on the events immediately preceding the accident, but he was not permitted to testify about Zinke's competence in general or as to what Pan Am's conduct in light of his incompetence should have been. Plaintiffs intended to rely primarily on the excluded evidence to show willful misconduct on the part of Pan Am.

The trial court excluded the proffered evidence on several grounds: 1) that the theory of negligent entrustment had not been raised in the pleadings or preserved in the pretrial order; 2) that the records were too old to be relevant; and 3) that they were improper evidence of habit or custom.

A trial court has broad discretion to admit or exclude evidence, and we review its decision only for abuse of that discretion. *Campbell Industries v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980). Even if there is error, reversal is appropriate only if we can say that the error affected the substantial rights of the parties. Fed.R.Civ. P. 61; *International Merger and Acquisition Consultants, Inc. v. Armac Enterprises, Inc.*, 531 F.2d 821, 823 (7th Cir. 1976).

First, we do not agree that plaintiffs' theory of negligence was "new." Defendants argue that they were unfairly surprised by the theory because it was not raised in the pleadings, and that the plaintiffs are precluded

from relying on it because it was not comprehended in the pretrial order.

As to the complaint, all that is required is specificity adequate to give notice to the defendant. Fed.R.Civ.P. 8(a); *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1050 (9th Cir. 1974); *Ross Island Sand & Gravel Co. v. General Insurance Co.*, 472 F.2d 750, 752 (9th Cir. 1973). The complaint alleges negligence in landing on the part of the crew, and negligence on the part of Pan Am, its agents and employees. Furthermore, Pan Am provided plaintiffs with pilot Zinke's training records during discovery and the records were attached to the pretrial order, to be admitted "without objection save as to relevance." Prior to trial, Pan Am deposed plaintiff's expert, Captain Cusmano. In his deposition, Cusmano stated that, based on the training record, he considered Zinke incompetent. We find that Pan Am had adequate notice that plaintiffs would seek to prove that Pan Am was negligent in allowing pilot Zinke to fly.[14]

As to the pretrial order, Pan Am's argument turns on the meaning of the language in "Plaintiffs' Contentions." The relevant portion reads:

> Plaintiffs contend that Pan Am and the decedent pilots willfully breached their duty to the passenger plaintiffs in the following particulars:

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[14] The trial court conceded that such an interpretation was possible, but that it was also possible to read the complaint as alleging only a theory of *respondeat superior*. Complaints are of necessity framed in general terms, and if both readings were possible, plaintiffs should have been allowed to pursue both theories. Fed.R.Civ.P. 8(a), (f); *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 102-103, 2 L.Ed.2d 80 (1957); *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1050 (9th Cir. 1974); *Janke Const. Co. v. Vulcan Materials Co.*, 527 F.2d 772, 776-77 (7th Cir. 1976).

. . . .

(1) that all crew members were qualified and competent to conduct the flight of April 22, 1974, designated Flight 812.

A fair reading of the order as a whole leaves the clear impression that plaintiffs were contending that Pan Am *failed* to ensure that all crew members were qualified and competent. There is no other reasonable explanation for the paragraph appearing under "Contentions," rather than under "Admitted Facts." Furthermore, many of plaintiffs' other contentions concern negligence and misconduct on the part of the crew. It is impossible to read these paragraphs consistently with a contention that the crew was competent. Furthermore, pilot Zinke's training records were attached to the order as plaintiffs' exhibits and listed in the order. Pan Am was not misled into believing that the plaintiffs conceded the issue of pilot competence. Accordingly, we find that neither the pleadings nor the pretrial order preclude plaintiffs from presenting evidence of negligent entrustment.

The trial court also held that the records were too old to be relevant, and that they were inadmissible evidence of habit or custom. We disagree.

The records were the continuous training records of pilot Zinke maintained by Pan Am from 1965 until the date of the fatal accident. Plaintiffs offered to prove, through their expert, that Zinke had demonstrated certain inadequacies as a pilot on several prior occasions, and that, in the opinion of their expert, Pan Am should not have allowed Zinke to pilot the flight in question. This testimony would certainly have been relevant, and for this purpose the records themselves need not be independently admissible. Rule 703 of the Federal Rules of Evidence permits an expert to base an opinion on any facts or data, admissible or not, which are "of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject." As long as plaintiffs can

establish that the training records fall into this category, they are entitled to have their expert give an opinion based on them. *Bauman v. Centex Corp.*, 611 F.2d 1115, 1120 (5th Cir. 1980); *see United States v. Featherston*, 325 F.2d 539, 542-43 (10th Cir. 1963). The trial court's failure to allow Captain Cusmano to testify as to his opinion of Zinke's competence, based on his training records, was error.

Furthermore, the records were not inadmissible because they did not meet the standard for evidence of habit or custom. Plaintiffs offered the evidence on two alternate theories. First, the records were offered to show that because pilot Zinke had made similar mistakes on prior occasions, he was likely to have made a mistake on this occasion. For this purpose they may have been inadmissible, as the trial court ruled. *See* Fed.R.Evid. 404. However, they were also offered to show that Pan Am had notice of Zinke's alleged incompetence, and that it should not have allowed him to fly. For this purpose they are relevant and admissible. *See* Advisory Committees Notes, Fed.R.Evid. 404 (". . . the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver [does not involve the] problem of the general relevancy of character evidence, and the present rule therefore has no provision on the subject."); *Breeding v. Massey*, 378 F.2d 171, 181 (8th Cir. 1967); 2 Weinstein's Evidence ¶ 404[20]. The training records themselves are admissible hearsay under Fed.R.Evid. 803(6) because they are "kept in the course of a regularly conducted business activity." This is not disputed. The trial court was concerned, however, that portions of the records might be double or triple hearsay, and that some might be too old to be relevant. It is open to the trial court on remand to exclude any portion of the records that is inadmissible hearsay, Fed.R. Evid. 802, or that is more prejudicial than probative, Fed.R.Evid. 403.

We must conclude that, because the evidence was central to plaintiffs' case, and the legal objections to it were not well-taken, it was an abuse of discretion for the judge not to permit plaintiffs' expert to testify on the issue of pilot competence and Pan Am's negligent entrustment, and to exclude all of the pilot's training records.

Plaintiffs proffer an alternate theory for admission of the evidence, which we think has merit. Pan Am's expert Baggott was permitted to testify that all of Pan Am's pilots, and Zinke in particular, were competent. He was also permitted to testify regarding the role of training records in the investigation of an accident, and was cross-examined regarding pilot competence generally. Plaintiffs argue that evidence of Zinke's incompetence is therefore admissible as rebuttal testimony. If Zinke's competence had not been at issue before, Pan Am put it in issue through the testimony of its own expert.[15]

For the reasons stated, the judgment of the trial court must be reversed and the case remanded for a new trial on the issue of willful misconduct.[16]

B. Punitive Damages

Plaintiffs contend that they should have been permitted to amend their complaint to state a claim for punitive damages. However, during the pendency of this appeal, this court held that California law does not permit punitive damages in wrongful death actions, and that this is not a denial of equal protection. *In re Paris Aircrash of March 3, 1974*, 622 F.2d 1315, 1319-20 (9th Cir. 1980). *See also, Georgie Boy Mfg., Inc. v. Superior Court*, 115 Cal.App.3d 217, 171 Cal.Rptr. 382 (1981) (denial of

[15] Baggot's testimony also belies Pan Am's contention that it was not prepared to counter evidence of Zinke's incompetence.

[16] Pan Am contends that the trial judge should have recused himself because of bias or prejudice against Pan Am. Pan Am has identified no prejudice to their case thus far resulting from an unsubstantial allegation of bias.

punitive damages in wrongful death action not violative of state constitution). The trial court was therefore correct in not permitting plaintiffs to amend their complaint.

V

CONCLUSION

We hold that evidentiary errors mandate a new trial on the issue of willful misconduct.[17] We further hold that the Court of Claims is the proper forum in which to litigate the question of taking if that should become necessary.[18] 28 U.S.C. § 1491.

REVERSED and REMANDED for further proceedings consistent with this opinion.

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[17] There need be no new trial on damages.

[18] We need not face here the novel question of whether plaintiffs might proceed directly to the Court of Claims without first retrying the willful misconduct claim in district court. We suggest only that a taking might not have occurred where plaintiffs have available remedies against a private wrongdoer that have not been exhausted.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6453

D.C. No. CV-75-1364-DWW

IN RE: AIRCRASH IN BALI, INDONESIA.

JOHN P. CAUSEY, JR., individually and as Executor of the Estate of JOHN P. CAUSEY, SR., and as Administrator with will annexed of the Estate of VIRGINIA D. CAUSEY, *et al.*,

Plaintiffs-Appellees,

v.

LEE B. ZINKE, *et al.*,

Defendants,

and

PAN AMERICAN WORLD AIRWAYS, INC.,

Defendant-Appellant.

ORDER

[Filed June 21, 1989]

Before: FLETCHER, PREGERSON, and LEAVY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
C. D. CALIFORNIA

M.D.L. No. 215
Nos. CV 75-1364-DWW, CV 76-1120-DWW and
CV 75-3293-DWW

IN RE AIR CRASH IN BALI, INDONESIA.

JOHN P. CAUSEY, JR., *Individually and as Executor of the* Estate of JOHN P. CAUSEY, SR., *and as Administrator* with Will Annexed of Estate of Virginia D. Midgett Causey, *Plaintiffs,*

v.

PAN AMERICAN WORLD AIRWAYS, INC., a New York Corp., *Defendant.*

MARGARET G. JOHNS as Guardian ad Litem of JOHN TRELOAR RYDER, SARAH JANE RYDER and SIMON BRUCE RYDER, minors, *Plaintiffs,*

v.

PAN AMERICAN WORLD AIRWAYS, INC., a New York Corp., *Defendant.*

SIMONE RYDER, Individually and as heir of JOHN WILLSON RYDER, Deceased, *Plaintiff,*

v.

PAN AMERICAN WORLD AIRWAYS, INC., *Defendant.*

Oct. 27, 1978

A. George Glasco, Los Angeles, Cal., James G. Butler, Butler, Jefferson & Dan, Los Angeles, Cal., for plaintiffs on behalf of the heirs and next of kin of John Willson Ryder (deceased).

Mark D. Robinson, Horgan & Robinson, Los Angeles, Cal., for plaintiffs on behalf of the heirs and next of kin of John Paul Causey and Virginia D. Midgett Causey (deceased).

Daniel W. Winters, Philip L. Johnson, Tucker & Coddington, Los Angeles, Cal., for defendant Pan American World Airways, Inc.

MEMORANDUM

DAVID W. WILLIAMS, District Judge.

On April 22, 1974 a Boeing 707 aircraft operated by Pan American World Airways as Flight 812 was headed from Hong Kong to the island of Bali, Indonesia, intending to land at Den Passar Airport, located at the island's southern tip. In darkness it began its descent and landing approach, but became lost. Instead of retracing its path and climbing higher, the crew kept the craft at an inordinately low altitude for too long a period. The plane crashed into a mountain located 37 miles north of the airport, killing all 96 passengers and the 11 crew members.

Numerous lawsuits were filed in several federal districts of the United States, and the Multidistrict Litigation Panel ordered all the suits transferred to the Central District of California for pretrial supervision. At this writing, most of the suits have been settled.

Wrongful death actions on behalf of the survivors of three of the passengers, John and Virginia Causey and John W. Ryder, were tried to a jury. The trial was bifurcated so that claims of the applicability of the War-

saw Convention [1] and its progeny [2] and the defenses arising from a contract of carriage, all having the effect of a limitation of damages, would be deferred until after the jury's damage verdict. This court earlier decided that, under the choice of law rules that should prevail, this action was governed by the wrongful death law of California.[3] The jury determined the accident was caused by the negligence, but not the wilful misconduct, of the defendant and that the Causey kin should receive total damages of $300,000 and the Ryder plaintiffs the sum of $651,500. A finding of wilful misconduct, under Article 25 of the Warsaw Convention,[4] prevents an air carrier from availing itself of any other provisions of the Convention which exclude or limit liability. Because there was no such finding, an issue remained as to the applicability of any liability limitation found in the Warsaw Convention and its progeny.

Following the jury verdict, plaintiffs moved this court to exclude all evidence concerning the contest of the contract of carriage between the airline and the passengers, as well as evidence of the applicability of the Warsaw

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[1] Warsaw Convention, October 12, 1929, 49 Stat. 3000 (1934), 137 L.N.T.S. 11 (1929).

[2] Hague Protocol, September 28, 1955, 478 U.N.T.S. 371; Montreal Agreement, CAB Order No. E-23680, Vol. 31, No. 97 Fed.Reg. 7302 (May 19, 1966), approving Agreement CAB 18,900.

[3] Cal.Code Civ.Pro. § 377.

[4] Article 25 provides:

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Convention on the grounds that such evidence was irrelevant and immaterial to the issues of these cases. Pan American opposed these motions. After a consideration of the moving and opposing papers and substantial oral argument, the court concludes:

1) The California wrongful death statute under which plaintiffs bring their case provides survivors with an independent cause of action arising upon the decedents' death and derived in no way from any cause of action belonging to the decedent.

2) Such cause of action is unaffected by any contract made by the decedents.

3) The Warsaw Convention, the Hague Protocol, and the Montreal Agreement provide air carriers with a basis contractually to limit liability. Air carriers may avail themselves of the limitation only if there is a contractual acceptance of the liability limitation, either actual or legal, by the party against whom the limitation is sought to be imposed.

4) The Warsaw Convention and its progeny do not limit an air carrier's liability with respect to the survivors' California wrongful death action.

5) Any evidence concerning the actual and legal delivery of a passenger ticket to the decedents, including physical delivery, timeliness of delivery, type size, and contents, is therefore irrelevant and immaterial to any issue before either the jury or the Court.

6) The plaintiffs' motions to exclude evidence on the Warsaw Convention and its progeny is granted.

I. THE CALIFORNIA WRONGFUL DEATH ACTION

It is a settled California rule that its wrongful death statute creates an original cause of action not derived from any rights the decedent may have had. *Earley v.*

Pacific Electric Ry. Co., 176 Cal. 79 at 81, 167 P. 513 (1917); *Burk v. Arcata & Mad River R.R. Co.*, 125 Cal. 364 at 367, 57 P. 1065 (1899); *Munro v. Pacific Coast Dredging Co.*, 84 Cal. 515 at 524, 24 P. 303 (1890); *Marks v. Reissinger*, 35 Cal.App. 44 at 53, 169 P. 243 (1917). It vests in certain heirs upon the decedent's death. *Earley*, 176 Cal. at 81, 167 P. 513; *Burk*, 125 Cal. at 367, 57 P. 1065; *Marks*, 35 Cal.App. at 51, 169 P. 243. It has its own measure of damages. *Earley*, 176 Cal. at 81, 167 P. 513; *Burk*, 125 Cal. at 368, 57 P. 1065; *Marks*, 35 Cal.App. at 51, 169 P. 243; *see Blackwell v. American Film Co.*, 189 Cal. 689 at 694, 209 P. 999 (1922). Because of the separate and original nature of this wrongful death action, a decedent, while he is alive, cannot contract away or compromise the wrongful death cause of action, nor effectively release from wrongful death liability a potential defendant. *Earley*, 176 Cal. at 79, 167 P. 513; *Marks*, 35 Cal.App. at 54, 169 P. 243. *See Blackwell*, 189 Cal. at 693, 209 P. 999. In *Marks*, the court squarely held that heirs seeking to recover in a wrongful death action cannot be defeated or affected by anything that the deceased could have said or done. In oral argument, defendant's counsel conceded the correctness of this interpretation of California law. Because, then, the cause is a new right of action independent of any right the decedent may have, and because it cannot be waived by the decedent or otherwise affected by decedent's contracting during life, any contract of carriage pursuant to which a decedent purports to limit the right to recover for his death therefore cannot affect this cause of action. If the issue before this court were simply a liability limitation in a contract of carriage entered into by a decedent, then it is clear that such limitation would have no effect in a California wrongful death action. The question remains whether in the instant case the Warsaw Convention, 49 Stat. 3000 (1934) dictates a different result.

II. THE WARSAW CONVENTION

A. *History.*[5]

The Warsaw Convention was the result of two international conferences held in Paris in 1925 and Warsaw in 1929. The purpose of the conference was twofold. First, since aviation was obviously going to link many lands with different languages, customs and legal systems, it would be desirable to establish a certain degree of uniformity. The convention achieved this almost completely as to documentation—tickets, waybills and the like. The second goal was to limit the potential liability of the carrier in case of accidents. The convention provided that carriers were liable for damages sustained by a passenger in the course of a flight or while embarking or disembarking, but limited this liability to 120,000 Poincairé francs—approximately 8300 U.S. dollars.[6] One of the bargains contained in the convention was that while retaining a limitation of liability, the convention shifted the burden of proof so that the carrier was presumed liable unless it could show that it had taken all necessary measures to avoid damages or that it was impossible for it to take such measures.[7]

The United States was not a party to the two international conferences in 1925 and 1929 which led to the Warsaw Convention, and only sent an observer. Five High Contracting parties deposited their ratifications to the original convention, and by the end of 1933 twelve countries were members. This did not include the United States. In November of 1933 the Commerce Department

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[5] *See* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.R. 497 (1967).

[6] This dollar equivalent has prevailed since the 1933 devaluation of the dollar.

[7] Article 20. The Montreal Agreement imposes absolute liability up to $75,000.

and the State Department realized the utility of the United States becoming a party to the convention and the Secretary of State recommended to President Roosevelt its approval of the treaty.

Article 38 of the Convention provides:

> "(1) This convention shall, after it has come into force, remain open for adherence by any state.
>
> (2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.
>
> (3) The adherence shall take effect as from the 90th day after the notification made to the Government of the Republic of Poland."

President Roosevelt submitted the Treaty to the Senate and on June 15, 1934, the Senate gave its advice and consent by voice vote.[8] The United States deposited its instrument of adherence on July 31, 1934 and the President proclaimed the Treaty 90 days later.[9] Thus, the United States had nothing to do with formulation of the convention and did not ratify it but adhered to it shortly after it went into effect, pursuant to Article 38.

A diplomatic conference was convened at the Hague in September, 1955 to consider, (a) the problem of raising the limits of liability over the prevailing $8300 ceiling, and (b) the clarification or modification of the convention's Article 25, under which there were no limits of liability if a plaintiff could successfully establish that the accident was caused by "wilful misconduct." It was proposed to raise the limits of liability to $13,300. The United States tried to get the limits raised to $25,000

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[8] 78 Cong.Rec. 11,582 (1934).

[9] 49 Stat. 3000.

and after a great deal of argument it was agreed to raise the limits of liability to $16,600, exactly double the Warsaw sum. In addition, Article 25's language was modified. The Hague Protocol prepared by the conference embodied these provisions.

For several years thereafter, little effort was made in the United States towards ratification of the Hague Protocol, which did not satisfy the opponents of the Warsaw Convention's liability provision. Increasing dissatisfaction in the United States and by the United States government with the Warsaw Convention's liability limitation had already led to modification proposals in the Hague Conference of 1955. As another attempt to modify the limitation, the Kennedy-Johnson Administration introduced domestic legislation, under which air carriers would be required to insure passengers at a higher level. Airline opposition to the compulsory insurance scheme led to the executive branch decision to denounce the Warsaw Convention on November 15, 1965, effective six months later, on May 15, 1966. On the same date that the formal notice of denunciation was deposited by the United States, the Department of State issued a press release which stated:

> "The United States would be prepared to withdraw the notice of denunciation deposited today if prior to its effective date of May 15, 1966, there is a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of $100,000 per passenger or on uniform rules but without any limit of liability, and if, pending the effectiveness of such international agreement, there is a provisional arrangement among the principal international airlines waiving the limits of liability up to $75,000 per passenger." [10]

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[10] 50 Dep't State Bull 923 at 924 (1965).

Under the impetus of the United States' dissatisfaction and of its denunciation of the treaty, the International Civil Aviation Organization, of which the United States is a member, met in Montreal in February, 1966, to work out a new liability limitation. The Montreal Conference ended with inconclusive results. As the effective date of the United States' denunciation neared, air carriers both United States and foreign reconsidered interim measures they had found unacceptable earlier. The carriers agreed to accept a system under which they were subject to a liability limitation of $75,000, without regard to fault on the part of the carrier.[11] The United States government, as a result of this acceptance by the carriers, withdrew its denunciation of the Warsaw Convention. The Montreal Agreement is the term used for the liability system that emerged out of these events of 1965 and 1966. *Dunn* v. *Trans World Airlines, Inc.*, 589 F.2d 408 at 410 (9th Cir. 1978).

B. *The Limitation of Liability*

Counsel argued the nature of the liability limitation in the Warsaw Convention and its progeny, the Hague Protocol, and the Montreal Agreement. Defendant's contention is that: 1) the Warsaw Convention is a treaty made under the authority of the United States and is therefore the supreme law of the land; and 2) the conventions expressly deal with the issue before this Court, and limit liability. Defendant cites in particular Article 22. Plaintiffs respond that the Warsaw Convention, by its terms, is applicable only to a contractual relationship which may exist between passengers and carriers; and that the Convention and its progeny read in their entirety merely provide a mechanism by which air carriers may limit their liability stemming from a contract of car-

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[11] For further discussion of this system and the basis of its legal authority, see Section II(B)(3) *infra*.

riage, citing Article 1(2). Plaintiffs assert that the liability limitation is based upon contractual principles, citing *Block v. Compagnie Nationale Air France*, 229 F.Supp. 801, 811 (N.D.Ga.1964), and arguing their interpretation is consonant with the treaty's notice requirements.

The plaintiffs' argument on the general contractual nature of the liability limitation is persuasive, in light of the Warsaw Convention's text, case law, the Montreal Agreement and the circumstances surrounding it, and today's federal public policy towards air carriers.

1. Text:

In addition to Article 1(2), the provisions of Article 3 underline the contractual basis of the liability limitation. Article 3(1) requires that a ticket state that the transportation is subject to the convention's liability rule, while Section (2) provides that a carrier must deliver a passenger ticket to a passenger if it is to avail itself of the convention's liability limitations. Article 22's liability limitation, including its own reference to the parties' ability to contract specially, is ambiguous when read in the light of the above-mentioned articles. It is clear that there is some relationship between the liability limitation, the passenger ticket and contract. It is unclear precisely what that relationship is. These articles should be construed, if practicable, so that they support and explain each other. *Bernier v. Bernier*, 147 U.S. 242, 13 S.Ct. 244, 37 L.Ed. 152 at 154 (1893). In order logically to reconcile these provisions, this court concludes that the liability limitation in Article 22 is one based upon contract between the parties to the contract of carriage. In order for the liability limitation to be effective, there must be a contractual acceptance, either actual or legal, of the limitation by the party against whom the limitation is sought to be imposed. Such an interpretation has the effect in this case of not limiting plaintiffs' recovery,

given the nature of the California wrongful death cause of action.[12]

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[12] The court finds the following Articles of Warsaw, *inter alia*, relevant to the question of the nature of the convention's liability limitation: (italics by the court):

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, *according to the contract made by the parties*, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Article 3

(1) For the transportation of passengers the carrier must *deliver a passenger ticket* which shall contain the folloing particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

2. Case Law:

Plaintiffs' citation to *Block v. Compagnie Nationale Air France*, 229 F.Supp. 801, 811 (N.D.Ga.1964) is apposite. The case is authority for the proposition that the convention gives air carriers permission to contract for limited liability, and by implication requires that the limitation, at least indirectly, be contractually based.

Great support is shown for the contractual basis of the liability limitation, particularly in light of recent cases. In *Glenn et al. v. Compania Cubana de Aviacion, S.A., et al.*, 102 F.Supp. 631 (S.D.Fla.1952), Chief Judge Holland held that the Warsaw Convention was applicable in the wrongful death action before him, because the convention was designed to regulate "the rights and liabilities

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(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alterration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) *A statement that the transportation is subject to the rules relating to liability established by this convention.*

(2) *The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation,* which shall none the less be subject to the rules of this convention. *Nevertheless; if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.*

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, *by special contract,* the carrier and the passenger may agree to a higher limit of liability.

of parties to international carriage contracts by air . . ." *Id.* at 633. It is now apparent that the threshold question of the convention's applicability depends upon the contract between the parties, and that the contract is expressed by the passenger ticket, *e.g., Kelley v. Sabena Belgian World Airlines*, 242 F.Supp. 129 (E.D.N.Y. 1965); *Burdell v. Canadian Pac. Airlines, Ltd.*, 11 Av. Cas. 17,251 (Ill.Cir.1969); *Galli v. Re-Al Brazilian International Airlines*, 29 Misc.2d 499, 211 N.Y.S.2d 208 (Sup.Ct. Queens Cty. 1961); *Straton v. Trans Canada Air Lines*, 7 Av.Cas. 17,724 (British Columbia, 1961); *Egan v. Kollsman Instrument Corp.*, 44 Misc.2d 348, 253 N.Y.S.2d 679 (1964), *aff'd on rehearing on newly discovered evidence*, 47 Misc.2d. 871, 263 N.Y.S.2d 398 (1965), *aff'd* 26 A.D.2d 633, 272 N.Y.S.2d 563 (App. Div. 1966), *rev'd on other grounds* 21 N.Y.2d 160, 287 N.Y.S.2d 14, 234 N.E.2d 199 (Ct. App.) (1967) (reversing on grounds that notice on ticket was inadequate). Today's courts treat the airline passenger ticket, absent effective notice of liability limitations, as a contract of adhesion. *See Deutsche Lufthansa Aktiengesellschaft v. C. A. B.*, 156 U.S.App.D.C. 191, 479 F.2d 912 (1973); *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 253 F.Supp. 237 (S.D.N.Y.1966), *aff'd* 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455, 88 S.Ct. 281, 19 L.Ed.2d 276 (1968); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965); and *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965).

Air carriers treat the tickets as contracts between them and the passengers.[13] It is interesting to note that the defendant in its pleadings and moving papers has asserted that the decedents were traveling under "a con-

[13] *See, e.g.*, the passenger ticket attached as exhibit A to defendant's motion for partial summary judgment on September 5, 1978. The ticket, typical of airline carriage documents, lists "Conditions of Contract", and the first such paragraph states "As used in this contract . . . ."

tractual ticket" or a "ticket contract," [14] and in the pre-trial conference order, the defendant explicitly adopted as its position that the Warsaw Convention and its progeny were applicable through the conditions of contract in the tickets of the plaintiffs' decedents. In its contentions in the pre-trial conference, the defendants argued that the decedents ". . . boarded PAN AMERICAN Flight 812 pursuant to a ticket duly issued which contained a Notice to each passenger on the possible applicability of the Warsaw Convention, Hague Protocol, and/or Montreal Agreement." [15]

The pre-trial conference order framed the issues before this court, under Rule 9, Rules of the United States District Court for the Central District of California.

Ross v. Pan American Airways, Inc., 299 N.Y. 88, 85 N.E.2d 880 (1949), *cert denied sub. nom. Froman v. Pan American Airways, Inc.*, 349 U.S. 947, 75 S.Ct. 874, 99 L.Ed. 1273 (1955) is not contrary; in addition, its authority has been severely diminished by subsequent cases. In *Ross*, plaintiff in a personal injuries action argued that the Warsaw Convention's liability limitation did not apply because her ticket had been obtained for her by a third party, and therefore there was no "delivery" within the meaning of Article 3, which is necessary if the liability limitation is to apply. The majority of the court rejected this contention. Despite the fact that the plaintiff never had an opportunity to examine the ticket prior to her de-

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[14] *See, e.g.*, Answer of Defendant to First Amended Complaint, *Simone Ryder v. Pan American World Airways*, CV 75-3293, at ¶ 7 ("contractual ticket"); Opposition of Pan American World Airways, *et al.*, to the Plaintiffs' Discovery Committee's Motion to Strike the Affirmative Defenses of the Warsaw Convention, etc., *In Re Aircrash at Bali*, MDL No. 215 (All Cases), at p. 14, where the liability limitation was discussed under the heading "contractual limitation," and the limitation argued pursuant to "the ticket contract."

[15] Pre-Trial Conference Order, pp. 28-29, at ¶¶ a, b, and c.

parture, the court found summary judgment appropriate for the defendant, on the grounds that plaintiff had implicity or explicitly ratified the third party's ticketing for her. The dissent argued unsuccessfully that the language of the convention's Articles 1 and 3 required that plaintiff be given the opportunity to show that she had undertaken no contractual relationship with the air carrier. The logic of the dissenter's position is that the convention's liability limitation is based upon a contractual relationship between the injured party and the carrier, rather than an invocation of the phrases supremacy clause and international transportation. This logic is persuasive. In any event, this court is interpreting a document which is allegedly a federal treaty, and is not bound by state court interpretations. *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677, 679 (2d Cir. 1957).

In federal law, *Grey v. American Airlines*, 95 F.Supp. 756 (S.D.N.Y.1950) followed the *Ross* decision's liberal application of the Warsaw Convention. The *Grey* case was decided the year following the *Ross* ruling, in a federal district court sitting in the *Ross* court's state. Subsequent decisions, both federal and New York state, have both diminished the authority of the *Ross* and *Grey* cases and read them narrowly. In *Lisi v. Alitalia-Linee Aeree Italiane*, 253 F.Supp. 237 (S.D.N.Y.1966), the court limited *Grey* to stand for the proposition only that a ticket need not necessarily list all "agreed stopping places" as required by the treaty for the Warsaw Convention liability limitation to apply. *Id.* at n.6. The *Lisi* court held that the liability limitation must be so included, if it is to have effect. *Id.* at 239. The court found a difference in the treatment accorded the two provisions appropriate, given the relative importance of the two. *Id.* at n.6. The liability limitation was a major provision, the stopping places listing a minor one. *See id.* On appeal, the court affirmed both the lower court's decision and its reading of *Grey*, see 370 F.2d at 508, n. 8. In *Mertens v. Flying Tiger Line*, 341 F.2d 851 (2d Cir. 1965), the court re-

versed the trial court, which had found the liability limitation applicable. The Court of Appeals found the carrier's delivery of the ticket to the passenger was not adequate. This result was directly contrary to the result in *Ross*. The *Mertens* court construed the *Ross* case very narrowly, reading it to say only that "the limitation on liability does not depend 'for its existence and validity on express assent thereto by the passenger.'" *Id.* at 857. The *Mertens* opinion was adopted by the Ninth Circuit in *Warren v. Flying Tiger Line*, 352 F.2d 494 (1965). The highest state court in New York has adopted a contract-like approach to the Warsaw Convention and has questioned the continued strength of the *Ross* decision, see *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 287 N.Y.S.2d 14, especially 20, 234 N.E.2d 199 (Ct.App.1968). *Grey* has been limited to the allowable exclusion of minor terms only from the contract, while *Ross* stands only for the proposition that the express assent of the party to be bound by the limitation need not be given. In the case at bar, there is no assent to be bound by the plaintiffs, nor could the plaintiffs' decedents have contractually limited the plaintiffs' causes of action, given the clearly recognized nature of the California wrongful death cause of action.

The recent trend, particularly the ticket notice cases, including *Warren v. Flying Tiger Line*, demonstrates the courts' willingness to review the interpretation of Warsaw [16] and the courts' protection of injured parties from Warsaw's liability limitations, in part through contractual and contract-like principles. Since there is no privity between the air carrier and the plaintiffs this court holds the Warsaw Convention's liability limitation does not apply in the present case.

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[16] *See, e.g., Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), in which Judge Lumbard reversed his own long standing opinions that the Warsaw Convention does not create a wrongful death action.

3. The Montreal Agreement:

The Montreal Agreement and the events surrounding it establish that this court's interpretation of the liability limitation is the correct one. The Montreal Agreement as such is an agreement among the air carriers, drafted with the participation of the Department of State, the CAB and the private International Air Transport Association. In the Agreement,[17] the carriers agree that each will include certain provisions in its contracts of carriage, specifically, 1) a liability limitation of $75,000, or $58,000 where a jurisdiction makes a separate award of litigation costs, and, 2) a notice to passengers advising them of the liability limitation. This agreement was approved by the Civil Aeronautics Board in an order dated May 13, 1966.[18] Article 2 of the Agreement refers to the resulting conditions of carriage as a special contract, and the CAB order approving the Agreement confirms that it establishes a special contract, "in accordance with Article 22(1) of the Convention." [19] The order further notes that passengers governed by this "special contract" mandated by the Agreement are entitled to the notice provided in the Agreement. Pursuant to the Montreal Agreement and the CAB order, all international air travel which, in the words of the CAB opinion, "includes a point in the United States as a point of origin, point of destination, or agreed stopping place" is subject to a special contract. Under this special contract liability is limited.

By their terms the Montreal Agreement and the CAB order make the liability limitation contractual in nature. This has been recognized by a noted commentator and has been adopted by a federal court. One author has

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[17] Generally known as Agreement CAB 18,900.

[18] Order No. E-23680, Vol. 31, No. 97, Fed.Reg. 7302 (May 19, 1966).

[19] Note that under Article 22(1) special contracts are between "the carrier and the passenger."

noted that the Montreal system ". . . impose(s) upon international aviation involving the United States a quasi-legal and largely experimental system of liability that is essentially contractual in nature." L. Kreindler, 1 Aviation Accident Law, Ch. 12, § 12A.02 at 3 (1975). In *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F.Supp. 702 at 704 n. 1 (S.D.N.Y.1972), the court quoted Kreindler on this point with approval, and by its observation elsewhere in its opinion demonstrated that it viewed Warsaw liability as contractually based, both before and after the Montreal Agreement. The court stated, "Yet it is difficult to question the modification effectuated by the Montreal Agreement of the contractual relationship between the parties within the Warsaw Convention system of liability." *Id.* at 707.

On two grounds, the Montreal Agreement, the CAB order and the circumstances surrounding their adoption establish that the air carriers' limitation of liability is contractually based. First, they are an authoritative rule for this court to follow as to the meaning of the original Warsaw Convention's limitation of liability. The United States, by its acceptance of the Montreal Agreement in lieu of denunciation of the Warsaw Convention, has clearly interpreted the limitation of liability as one based on contract. Were the liability limitation not contractual in nature, then the United States could not accept a scheme clearly contractual to modify the limitation. Second, they supercede the Warsaw Convention in their provision of a basis to limit liability. The United States executive branch explicitly conditioned the withdrawal of its denunciation of the Warsaw Convention on the new liability limitation scheme. *See* CAB Order Number E-23680, 31 Fed.Reg. 7302 (May 19, 1966); CAB Press Release 66-61, 382-6031 (May 13, 1966); Department of State Press Release No. 110 (May 13, 1966). The low liability regime of the earlier Convention was rendered moot. *Id.* This court must give substantial weight to the construction given by the executive

branch to a treaty, although it must not abdicate its judicial responsibility. *Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S.Ct. 922, 6 L.Ed.2d 218, 223 (1961). Under the circumstances, in which the United States denounced the Warsaw Convention, and then withdrew its denunciation in the light of the Montreal Agreement, this court may analogize the Warsaw Convention to a statute reenacted after a definite interpretation has been given to a particular provision by an authoritative voice. In such a case, the intervening interpretation is deemed to be the correct one. *E.g., Cammarano v. U.S.*, 358 U.S. 498 at 510, 79 S.Ct. 524 at 531, 3 L.Ed.2d 462 at 470 (1958); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110 at 115, 59 S.Ct. 423, 83 L.Ed. 536 at 540 (1939); *Morrissey v. Commissioner of Internal Revenue*, 103 F.2d 234 at 235 (9th Cir. 1939). In this case, the executive branch by its adoption of the Montreal Agreement and its withdrawal of the Warsaw Convention denunciation requires that this court read into the Warsaw Convention the interpretation given by the Montreal Agreement. This interpretation, it has been shown, gives a contractual basis to the liability limitation.

Moreover, the liability limitation established by the Montreal Agreement is given the force of law through a tariff approved by the CAB in its opinion of May 13, 1966. It is hornbook law that an ambiguity in a tariff prepared by the carrier is construed against the carrier. *E.g., Chicago & N.W. Ry. Co. v. Hunt-Wesson Foods, Inc.*, 504 F.2d 905 at 908 (7th Cir. 1974), *Penn Cent. Co. v. General Mills, Inc.*, 439 F.2d 1338 at 1341 (8th Cir. 1971). Construing the tariff embodied in the Montreal Agreement, this court holds that air carriers were given the right to limit their liability to $75,000, only if a special contract exists between a carrier and the injured party. The Warsaw Convention's liability limitation is no longer viable. The remaining utility of the Convention remains not in the area of the liability limi-

tation, but as a general international expression of the need for uniform air laws, *see* Department of State Press Release No. 110, May 13, 1966. In the specific area of the liability limitation, the United States by its denunciation, approval of the Montreal Agreement, and withdrawal of its denunciation, has demonstrated that a right to a high damage recovery is more important to the United States than conformity on this point. The argument made by the court in *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977), that great weight should be given to the need to have a uniform body of worldwide liability rules, is therefore not apposite here, where the United States has explicitly made its continued adherence to the Warsaw Convention contingent upon a non-uniform higher recovery rule for United States passengers.

As has been demonstrated in parts 1 and 2 of this section of the opinion, the basis of the Warsaw Convention's liability limitation is contractual. It is clear that whatever argument to the contrary could be made before, the Montreal Agreement and its adoption conclusively confirm that the liability limitation is founded in contract. This court is compelled to give meaning to the conception established by the Montreal Agreement that the liability limitation is based upon a special contract. Since the plaintiffs were not parties to any special contract limiting liability, their recoveries cannot be so limited.

4. Federal Public Policy:

To the degree that the Warsaw Convention has effect in this court, it has so as a federal treaty. In deciding its interpretation, this court must consider what result is demanded by federal public policy. It is clear that the present public policy of the United States is to view air carriers as viable entities no longer dependent upon government protection through an "infant industries" argument.

One must take into perspective the time factor in a consideration of the wisdom of this country subscribing to the Warsaw Convention in 1934. The aircraft industry was in its infancy, relatively minor in importance in the total public transportation picture and technologically in its formative years. For example, in the five-year period commencing 1925, the total airlines operation encompassed only 400 million passenger miles with a fatality rate of 45 per 100 million passenger miles. This comparies with the rate of 0.55 fatalities per 100 million passenger miles in 1965.[20] The need to protect the infant airline industry was a clear rationale behind the adherence by the United States to the Warsaw Convention. *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408 at 410 (9th Cir. 1978); *Kelley v. Societe Anonyme Belge D'Exploitation, etc.*, 242 F.Supp. 129 at 138 (1965). Secretary of State Cordell Hull wrote to the president in the letter transmitting the convention to the Senate that the principle of limitation of liability was designed "to be an aid in the development of international air transportation." Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934).

The limitation imposed by Warsaw made sense at the time because the developing airline needed to have some assurance that it would not be financially wiped out by catastrophic accident. A totally different picture is presented today. The industry has grown to hold a major position in the area of public transportation, even causing competitive injury to rail and ship carriers. Technical and safety development has been such that the public has given wide acceptance to air travel and the incidents of air crashes have been materially reduced in number. There is now a strong factual basis for the argument

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[20] *See* 1965 annual report of the International Civil Aviation Organization Assembly.

that a legal limitation on the amount a plaintiff may recover in the event of an air tragedy is unwarranted. *E.g.*, 1 L. Kreindler, Aviation Accident Law, Ch. 11, § 11.01(2), (5) (1975). The pioneering conditions and the lack of technical advancement and passenger safeguards which faced the industry when Warsaw was adopted have been supplanted by a technologically and commercially mature industry.

In recent years, the federal public policy towards air carriers has conclusively shifted away from a protective, infant industry approach to a less regulated, market-determined system. As a result, the rationale behind an industry-protective limited-liability approach to airline accidents, one of the keystones of the *Ross* decision, is gone. Rather than having a favored-industry status, airlines are now expected to stand on their own feet in the competitive market. One aspect of this new independence is responsibility for damages caused by its negligence.

Official recognition that federal public policy towards airlines should shift from a protective infant industries approach to a competitive one began in 1975, *see* Senate Subcommittee on Administrative Practices and Procedures of the Judiciary Committee, 94th Cong., 1st Sess., Civil Aeronautics Board Practices and Procedures (report, 1975). With the Carter Administration, this market-oriented approach to the airlines has become law through a series of CAB orders. *See* Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Orders 78-3-121 (March 24, 1978), 78-7-116 (July 21, 1978); Proposed Rule Re: Domestic Passenger-Fare Investigation, 43 Fed. Reg. 16503 (1978); Domestic Passenger-Fare Investigation, CAB Order 78-8-152 (August 25, 1978), 43 Fed.Reg. 39522 (1978); Oakland Service Investigation CAB Order 78-4-121 (April 19, 1978), 43 Fed.Reg. 24083 (1978), CAB Order 78-9-96 (September 21, 1978), 43 Fed.Reg. 43515 (1978). This competitive

policy towards air carriers has been definitively adopted by the United States, through the Airline Deregulation Act of 1978.[21] This act phases out the CAB's authority over the major economic aspects of the airline industry, fares, routes, and mergers. Air carriers will be treated just like any other non-regulated industry.

An across-the-board liability limitation, if it ever made sense, did so only for the technologically and commercially infant air carriers earlier in the century. Today, the vigorous airline industry has been told by the United States executive and legislative branches to stand on its own feet. The judicial branch must recognize this policy. Modern federal public policy leads to the same result found appropriate by this court on grounds of the Warsaw Convention's text, the case law, and the Montreal Agreement: an air carrier may avail itself of the liability limitation only if there is a contractual acceptance, either actual or legal, of the limitation by the party against whom the limitation is sought to be imposed.

The evidence sought to be introduced by the defendant concerned the delivery of passenger tickets, adequacy of notice, and timeliness of delivery to the decedents, and air carrier filings with the government. This offer at best would establish a valid contractual limitation of liability based on the Warsaw Convention and its progeny only as between the decedents and the air carrier. Given the independent nature of the California wrongful death right of action, such a contractual limitation, even if found, could not as a matter of law diminish the plaintiffs' recovery. The evidence sought to be introduced is therefore irrelevant and immaterial to the instant action.

The clerk of court is directed to cause entry of judgment pursuant to the jury's damage verdicts of September 7, 1978.

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[21] Signed by President Carter on October 24, 1978. As of the date of this writing, a public law number has not yet been assigned.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-1364-DWW
CV 76-1120-DWW
CV 75-3293-DWW

IN RE: AIR CRASH IN BALI, INDONESIA ON APRIL 22, 1974

AMENDED SPECIAL VERDICT

1. Was Capt. Zinke or the crew of Pan American Flight 812 guilty of wilful misconduct?

Yes
No X

2. Did Pan American Company commit wilful misconduct by entrusting flight 812 to Capt. Zinke with the knowledge of his unfitness or incompetence in specific areas of piloting?

Yes X
No

3. Did the wilful misconduct of the captain or crew of flight 812 proximately cause the crash?

Yes
No X

4. Did the wilful misconduct of Pan Am entrusting flight 812 to Capt. Zinke proximately cause the crash?

Yes X
No

5. Did the tickets which Pan Am delivered to these passengers comply with the Warsaw Treaty requirement which says that in order for a carrier to have the advantage of a limitation of damages to a passenger injured or killed in a crash of one of its airplanes, it must prove by a preponderance of the evidence that (1) it delivered to the passenger a ticket containing language which would appropriately warn a passenger of the Warsaw limitations, (2) printed in at least 10 point modern type in ink contrasting with the ticket stock (3) printed on each ticket and (4) delivered to the passenger sufficiently in advance of the departure of the flight as to allow the passenger to take alternative measures?

Yes X
No

6. At the time of the delivery of the ticket to plaintiff Causeys was there on display in a conspicuous place in all locations which were in charge of an agent employed by Pan Am to sell its tickets, a sign which had printed thereon the same statement set forth above as to the ticket, or in the alternative, a sign which purported to advise of limitation of damages for personal injury or death and directing the passenger to consult the airline or travel agent for further information?

Yes
No X

7. At the time of the delivery of the ticket to plaintiff Ryder was there on display in a conspicuous place in all locations which were in charge of an agent employed by Pan Am to sell its tickets, a sign which had printed thereon the same statement set forth above as to the ticket, or in the alternative, a sign which purported to advise of limitation of damages for personal injury or death and directing the passenger to consult the airline or travel agent for further information?

Yes
No X

CERTIFICATE

I, the undersigned foreperson of the jury, certify that the above inserted answers to the various questions in this Amended Special Verdict represent the unanimous verdict of the jurors as to each said question.

DATED: This —— day of June, 1986.

_____

Foreperson

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos.: 70-3341
78-3761
78-3762
78-3763

MDL No. 215

Nos.: CV 75-1364-DWW
CV 76-1120-DWW
CV 75-3293-DWW

IN RE: AIR CRASH IN BALI, INDONESIA ON APRIL 22, 1974

JOHN P. CAUSEY, JR., ETC., *et al.*,
Plaintiffs,

v.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants.

SIMONE RYDER, ETC., *et al.*,
Plaintiffs,

v.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants.

MARGARET G. JOHNS, ETC., *et al.*,
Plaintiffs,

v.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants.

JUDGMENT

[Filed July 24, 1986]

On October 27, 1978 a jury (first jury) in the above-entitled case rendered judgment in favor of the Causey plaintiffs in the amount of $300,000 and $651,500 to the Ryder plaintiffs. On August 24, 1982 the court of appeals reversed as to liability and remanded the case to be retried on liabilitity alone and ordered that there be no new trial on the subject of damages. In 1986 the cause was retried and a jury (second jury) found wilful misconduct on the part of Pan Am and ordered judgment in favor of the plaintiffs. Based upon the findings of the second jury and based upon the order of the court of appeals that there be no retrial of damages by the second jury, judgment is now ordered in favor of the Causey plaintiffs in the amount of $300,000 with interest thereon at the rate of 8.95% from October 27, 1978 to the date of payment, compounded annually, and judgment is further ordered in favor of the Ryder plaintiffs in the amount of $651,500 with interest theren at the rate of 8.95% from October 27, 1978 to the date of payment, compounded annually.

DATED: This 23 day of July, 1986.

/s/ David W. Williams
DAVID W. WILLIAMS
Senior U.S. District Judge

Taxed costs in sum of $[illegible], against [illegible].

Taxed costs in sum of $[illegible], against [illegible].

[EXCERPTS FROM HUDSON REPORT]

June 13, 1975

TO: Assistant Administrator, AEU-1

SUBJECT: Special Inspection—Pan American World Airways, 1974

INTRODUCTION. This report is being prepared in a narrative manner with a special effort to avoid a voluminous and redundant package. The team has taken the position that all individuals who will review this report have a good, and possibly an intimate, knowledge of Pan American Airways' operation. Further, PAA management, FAA management at the Washington and European Region levels, all appropriate Air Carrier District Office Chiefs, and certain lead airman certification inspections have been debriefed throughout various stages of the special team's inspection. European Region key personnel also served as advisors to the special team, participated throughout the major portion of the inspection, are personally aware of the detailed findings, and have initiated corrective action in some areas.

On June 28, 1974, the special team gave a final debriefing to PAA management personnel and this report will follow as closely as possible that debriefing; however, it will include more detail and some comments and recommendations that were not highlighted during the briefing. It is recognized that PAA has already initiated many management, technical, and procedural changes as a result of their Operations Review Group Study and our report to some degree will highlight areas that PAA is aware of and has or is considering appropriate corrective action. (See Exhibit 3—PAA Operations Projects Status Report)

As a matter of record, the team is keenly aware of the impact of this report as related to economics, union contractual agreements, public relations, and many other

areas that may involve directly or indirectly some employees and we are not without compassion; however, *safety* must come *first* and in this light our views and recommendations are made.

BACKGROUND. On April 27, 1974, a decision was reached by the European Region with the concurrence of the Flight Standards Service and the Administrator of the Federal Aviation Administration that recent accidents and incidents involving PAA justified a special FAA inspection. Team members were selected who had no previous extensive exposure with PAA's operation but with mature and broad FAA experience with major domestic airlines of equivalent size, scope, and type of operation. The team consisted of the following (maintenance personnel were not included but were available if required):

	FULL TIME
Jack W. Hudson	Coordinator—Chief, Fort Worth ACDO B-707
Homer J. Bell	Principal Operations Inspector AAL (Former POI-BNF) B-747/727 Fort Worth ACDO
R. Lynn Mayfield	Principal Operations Inspector UAL B-707/747—Denver ACDO
Ivan L. Behel	Principal Operations Inspector FAL B-707/727—Denver ACDO
William A. Kleiber	Lead B-747/707—Forth Worth ACDO
Joseph C. Dydek	Lead B-707—Fort Worth ACDO
Dale Peterson	Lead B-747/707—Minneapolis ACDO
Stan Mohler, M.D.	Washington, D.C.
	PART TIME
W. R. Williams	B-707/727—Chicago ACDO
Richard Cox	B-727—Honolulu FSDO
J. D. Brown	B-707—Los Angeles ACDO
Charles E. Hart	B-747/707—Minneapolis ACDO
Ralph Tranbarger	B-707—Los Angeles ACDO

ADVISORS

Will J. Thielen	Principal Operations Inspector PAA—New York IFO
Louis C. Bicknese	Lead B-707—New York IFO
Melville Norgart	SWAP, International Field Office, New York

The inspection team used every available source of information to become knowledgeable of PAA's past and present operation. This included extensive interviews and consultation with FAA personnel at Washington, European Region, all ACDO's, including pertinent SWAP findings, key PAA management personnel at all domiciles, and close coordination with the appropriate employee unions (pilot, flight engineer, cabin attendants, dispatchers), and discussions with literally hundreds of flight crews, dispatchers, ground support personnel (operations and maintenance). In fact, the team was presented a well prepared special written report from the San Francisco pilot group outlining their observations and recommendations regarding improving safety of operation on PAA. The team was tremendously impressed with the whole-hearted cooperation of PAA's management. Their employees were completely "open and above board" regarding any requests that the team made during the course of this inspection. Most employees felt the FAA inspection was long overdue and their dedication and concern for their company's safety record and general well-being for a prosperous future is unparalleled.

In summary, the team believed that through excellent cooperation on the part of PAA and its employees, our investigation was a much shorter and easier task and a general spirit of government and industry mutually trying to solve a problem together was displayed throughout. No expression of criticism was ever brought to any team member's attention regarding the manner in which the inspection was conducted, and numerous compliments

were made regarding the caliber and the professionalism of the team members by both management and employees.

TEAM COVERAGE. The team's goal was "fact-finding" and every effort was made to develop a close relationship of confidence with PAA employees. We went to great lengths in meeting with appropriate management, union personnel, and individual employees to assure them that this was in no way a "witch hunt" and that it was not our intention to take disciplinary and/or enforcement action during the course of our investigation, unless it was absolutely necessary. Further, as a "fact-finding" team, we emphasized that we were looking at PAA's "end product" and in essence comparing PAA's operation to other major air carriers or industry's "state of the art." We gave our complete assurance that any communications they made with any team member would be held in the utmost of confidence and the employee not revealed, and to this end the team has kept its word.

Initially, the team studied PAA's management, manuals, procedures, etc., and was given extensive briefing and background information by European FAA personnel on all matters related to problem areas, training, accidents/incidents, SWAP, management, trends, and numerous other areas to prepare the team to begin its inspection. A determination was made to concentrate in the following areas:

Company management

Airman training/proficiency checks/en route inspections

Operational procedures

Training records (random sampling)

Simulators

Cockpit discipline/complacency and management

Approach/altitude awareness

Communications/dispatch

Airport/route qualification

Check airmen programs

Flight attendant training

Maintenance—line

Support functions—line stations

Operational fatigue—crew scheduling

FAA's accomplishment of assigned responsibilities

Our investigation consisted of at least six weeks of on-site investigation with specific inspection visits to San Francisco, Miami, New York, and Berlin. Also, we held extensive discussions with all key management personnel, appropriate union representatives, employees, and locally assigned FAA personnel. During the course of this inspection, we conducted 160 en route inspections over the vast majority of PAA's routes and into a major number of their stations. We observed 137 different flight crews which consisted of the following percentage of PAA total captains:

20%	B-747
13.5%	B-707
39%	B-727

Four line check captains were observed during the en route inspections. A total of 19 proficiency or "B" checks were observed by team members.

FINDINGS/DISCUSSION. The following are some findings observed by the team:

36.8% of the PIC's failed their proficiency checks that the team observed.

One check pilot was removed and at least two other check pilots recommended for removal based in their past records.

Some PIC proficiency checks would have been passed by the check airman if one of the team members had not been present.

Company records reflect many cases of substandard performance or trends of substandard performance on the part of several check airmen (see Exhibit #1).

Company records reflect many cases of substandard airmen that have received considerable training, frequent follow-up checks or extra training, or commonly known as "spoon fed" (see Exhibits 1A & 1B).

It is common flight line gossip among the airmen and in some cases cabin attendants that PAA has captains and first officers that are considered substandard by their "peers" and have been "carried" by the company and need the help of strong copilots. Further, efforts were made by certain first officers, second officers, and flight engineers to specifically avoid having a flight schedule assignment if at all possible with some substandard captains. A few of these substandard captains were identified by team members during the course of its inspection through company records, observations during en route inspections, proficiency checks, and many names were provided to the team in confidence by various highly concerned company employees. This list of names has been provided to PAA as well as the appropriate FAA Air Carrier District Offices for follow-up. (The team recognizes that some of the names provided by company employees may have been as a result of personality conflicts and not necessarily related to the airman's proficiency.)

To further verify the above comments, please refer to Exhibit 2 for a review of the training record of Captain D. B. Zenke, who was killed in the B-707 accident at Bali. While not a part of this Exhibit, FAA inspectors at San

Francisco ACDO had knowledge and some records to verify that the captains on the Pago Pago and Tahiti accidents were also substandard. It was also common knowledge that the captain killed in the B-707 cargo accident at Manila was also considered substandard.

PAA's record of early airmen retirements (other than medical) over the past few years as compared with their present program to identify the "weak pilots" supports the above findings.

PAA 1971—approx. 5
1972—approx. 5
1973—approx. 15
1974—approx. 40+ (PAA does not wish to release exact figures to the team)

In addition, a review of PAA's company pilot proficiency check failure rate for the year 1973 was 5 percent. When FAA observed the proficiency checks, the failure rate increased to 13 percent. A spot check comparison was made with three other major air carriers, all of which have centralized training, and it was noted that the differential in failure between company varsus FAA observed was almost negligible. Further, these three major air carriers with centralized training had an overall proficiency failure rate of less than 3 percent. Further, a spot check comparison of initial checkout times to obtain a type rating revealed that PAA required approximately five hours of flight time in addition to their simulator training program, whereas other air carriers were requiring approximately two hours flight time. Note: The team understands that on a national basis for all air carriers the failure rate is five times higher when an FAA Inspector is on board the aircraft/simulator observing or conducting the proficiency check.

In the area of cockpit discipline and management, our initial en route inspections on flight crews based on the West Coast revealed that approximately 43 percent failed to follow some established cockpit procedures such as call

outs, setting of airspeed and altimeter bugs, use of check list, excess approach speeds, non-stabilized approach, high sink rates, etc. However, as the team progressed to other parts of PAA's system, the "word" was out to the flight crews regarding our observations, and our overall tally on 160 en route inspections revealed the following percentages of flight crews who failed to make "call outs":

15.5%—B-707
3.1%—B-747
5.8%—B-727

Other percentages of general interest are:

4.5% of all crews observed failed to follow some established cockpit procedure.

3.1% of all crews gave no predeparture briefing.

60% of the crews used the term "standard" briefing. 4% did not use shoulder harnesses.

10% had variation in use of the airspeed and/or radio altimeter/bug settings.

RECOMMENDATIONS. In view of the significant *safety findings* outlined above, it is the team's opinion that there is an *immediate need* to take corrective action in the following areas. (It is fully recognized that some of our recommendations are *above and beyond* the requirements of the regulations in certain area; however, PAA as well as other air carriers normally exceed certain regulation requirements and we believe that PAA's safety record *must be improved.* The regulations establish a *minimum* requirement which too often becomes a maximum used by an air carrier.

#Regulatory (requirement or controlled)

*In addition to the regulatory requirements

1. Revise the approved initial and recurrent training programs to fit the area of operation or environment in

which the airman operates. (PAA could have several different approved recurrent training programs.)

#a. Update all manuals and specifically the training manual to include written standards and pictorial displays of all required maneuvers. (There is a real lack of standardization among the flight crews.)

The company manual used in lieu of the Airplane Fight Manual should be updated to include all limitations in one section of the manual or carry the AFM on the aircraft.

#b. Update and standardize certain cockpit procedures such as call out procedures, altimeter and airspeed bug setting, use of radio altimeter, and revise and update the aircraft check list.

The check list for each aircraft should be reviewed to reduce redundancy and fit the type of operation and include such additional items as shoulder harness, landing lights, pilot heat. (There is a real lack of flight crew standardization in this area.)

#c. Require all instructors and check airmen to strictly adhere to established company procedures throughout all phases of initial/recurrent training and line operation to achieve the highest degree of cockpit standardization and management.

#d. Require recurrent aircraft flight training for those airmen whose flight schedule indicated limited exposure to approaches and landings. (This is specifically related to flight crews operating in the Pacific but other PAA routes should be considered.)

#e. Increase the required flight simulator and recurrent ground training time for all crewmembers (simulator course of training approved under FAR 121.409 and time allotted for the simulator check under FAR 121.441), in order to provide sufficient training to obtain the same level of proficiency as initial for qualifications.

#f. Evaluate the need for increased flight engineer training for more depth in aircraft systems for improved maintenance support and analysis. (No deficiencies were noted in the performance of flight engineer duties; however, there may be some company advantages in increased knowledge in support of dependable line operation.)

#g. Develop and improve the home study courses provided to airmen.

*h. Change the airman's image of PAA training from that of "check training department" to a "proficiency training department."

Provide adequate training to bring the airmen to an acceptable standard recognizing that training needs will vary among airmen and, in some cases, is directly related to the routine proficiency obtained during scheduled operation.

*i. Open channels of communication from the crewmembers to top management.

*j. Re-evaluate the company's position regarding centralized training. It is recommended that in view of the recent accidents, the company's internal review and this report, that a hard look should be taken at the company's three separate training centers to determine if, in fact, a satisfactory and standardized "end product" is being produced and retained. The team is of the opinion that those air carriers which have centralized training have a better accident/safety record, higher degree of standardization, better procedures to identify "weak pilots" with remedial action, etc.

The following accident record was obtained from AFS-50 which shows the relationship between PAA and some major air carriers (TWA, UAL, AAL, NWA, EAL, DAL) which have centralized training programs. Some programs are more centralized than others and have been in existence for various periods of time.

	1970-1974	
	Total Accidents	Fatal Accidents
PAA	17	5
EAL	15	3
DAL	22	3
TWA	20	1
UAL	18	1
AAL	11	0
NWA	8	0

*k. Review company proficiency check records to identify those flight maneuvers which crewmembers have to repeat most often and "beef" up training in that area.

*l. Consider completing the entire proficiency check prior to training on unsatisfactory maneuvers. This would prevent the check airman from training/checking/training until he is actually leading the trainee.

In summary, it is the team's opinion that PAA, in comparison with the air carriers to which the team members are assigned, *is below* the "state of the art" in air carrier management, training, cockpit procedures, standardization, and adherence to established procedures by airmen.

2. Develop an adequate program for PAA management to identify in a timely manner substandard airmen and effect immediate corrective action.

*a. Require all check airmen (equipment or line) to be current and qualified line captains. (It may be desirable to consider the use of selected captains who have reached the age of 60 to serve in this capacity, particularly the line check captain position, in which case a requirement to be a current line captain could be deleted.)

Forty-eight PAA equipment check airmen are full time professional training instructors, which is a vast majority. These individuals hold a low airman seniority number. In fact, if they did not have their present check

airman position and had to return to line duty, they would be furloughed. In our opinion, a number of these individuals have accepted a low standard of performance on the part of airmen and the fact that they have not served as a captain on the airline and more vividly have no job security with the company are placed in a posture of not being able to be completely objective and unbiased in their decisions on airman performance.

In our view, an individual that is given the responsibility as a check airman must have job security above and beyond the professional airman requirements and be recognized as an "arm of management" with management's full backing. Most major air carriers use current and qualified line captains for all "check" rides in simulators/airplanes and only use professional instructors for training purposes only.

#b. Require all check airmen to be fully qualified for the training and checking they are to conduct.

PAA records failed to reveal that a number of check airmen (equipment or line) had completed the approved check airman training program.

#c. Require all check airmen to requalify and be redesignated by the FAA.

In view of the *performance of a number of check airmen* and the fact that PAA's records were not complete regarding the training given to check airmen, we believe that this area is important to assure that only the more capable individuals (current line captains) are selected as check airmen and that a positive training program will indoctrinate such individuals as to their responsibility.

*d. Place all check airmen on the "management team" within the company organization and such check airmen should be on a full time assignment.

Presently, most of PAA's equipment check airmen are on a full time assignment, namely because they have in-

sufficient seniority to hold a bid on the line. However, the line check airmen who are current line captains do not serve on a full time basis. They normally perform the line check function for one month and then return to the line as a full time captain for two months. It is our view that this program is ineffective; that line check captains are not accepting their responsibility and do not serve for sufficient period of time to have a personal knowledge of the flight crew's overall performance nor a good knowledge of routes/airports in their areas of operation. This phase of the checking program has been one of more or less "filling the squares" to meet the FAA requirements and the line check airmen are really not being utilized in the manner the regulations intended. As recommended previously, we feel that the check airmen, both equipment and line, *must be on a full time management* assignment with some arrangements whereby they can periodically fly on an occasional scheduled trip to maintain their professional skills as a line captain. (Most major air carriers use full time line check captains.)

#e. Records should be improved and maintained in a more complete manner: to assure that all check airmen training is appropriately documented and all other airmen records are kept up-to-date.

In summary, the team believes that PAA has not had an effective check airman program and thus numerous substandard airmen have been approved to continue in line operation. Therefore, this program must be given the strength that is needed to bring it to industry standards even if it results in displacement of present professional instructors.

3. Revise airmen bidding policies and revamp and improve route and airport qualification procedures.

*a. Reduce the operational area in which an airman may bid and require such airman to remain in such area for a minimum time frame of approximately one year.

Under PAA's present bidding system, any airman can bid system wide on a month-to-month basis and their route and airport qualification procedures are so broad that any airman can fly over the entire system by merely reviewing airport films, most of which are out-of-date and their value is questionable.

*b. Reduce the present areas of route and airport qualification to correspond to reduced area of operations in item a.

#c. Update all airport qualification films and determine if the present "state of the art" would not justify a more appropriate method of route/airport qualification. (Miami based airmen have narrative route sheets that have merit and should be expanded.)

*d. Re-evaluate TDY assignments of airmen, particularly captains and first officers, from one area of operation to another without extensive and improved route and airport qualification procedures.

*e. Consider a requirement that first officers be airport and route qualified. It was noted during the inspection that if the first officer was unfamiliar with routes, foreign ATC, and airports, it created an additional burden on the captain. (If neither pilot is thoroughly familiar, confusion reigns.)

#f. Each month elaborate crew scheduling/tracking planning is developed based on bid awards. Often crews are diverted from their awarded bids once they leave the home base. It is questionable whether or not these diverted crews are airport or route qualified when so diverted. The tracking section should have instructions limiting or restricting these diversions to insure airport/route qualifications.

*g. Seriously consider the establishment of overseas crew bases in order to achieve improved route and airport familiarity and to reduce the overall operational

schedule pattern fatigue problem which will be discussed later in this report.

PAA has no overseas crew bases other than Berlin, which operates the IGS service. In years past, they had a number of overseas bases, but with the advent of the jet age they have gradually been closed.

*4. Eliminate permanent first officers.

A first officer who fails to hold the qualification to be a captain should not be put in a position as a permanent first officer when it would be questionable that he could assume command if the captain became incapacitated, PAA has approximately 30 to 40 airmen in this capacity. They should either be retired or if this is not possible, they should be used only as a second officer or retrained as a flight engineer but in no case used as a first officer.

* * * *

CONCLUSION. As a result of the team's overall findings, the following recommendations were made to Washington and European personnel on June 27, 1974, and were adopted as a positive FAA action that would be taken immediately with other recommendations in the report to be followed up appropriately.

1. *Observe each pilot-in-command* on an en route inspection or proficiency "B" check within the 90-day period from 6/20-9/20/74. PIC's who had been observed since 1/1/74 need not be re-observed except for unsatisfactory performance. Those captains who were observed by members of the special inspection team must be observed again only if they failed to adhere to any company procedures or otherwise demonstrated unsatisfactory performance.

In their efforts to obtain factual information and gain the confidence of all company employees, the special inspection team gave assurance that all information would be treated confidentially. Each office will receive, in the very near future, a list of captains that the special in-

spection team observed and there will be an indication by each captain's name as to whether any non-compliance was observed. Should this be so noted, another observation will be required.

Except for special inspection team reports, all en route inspections since 1/1/74 and henceforth will be reported to PAA. For example, the captain, first officer, flight engineer who fails to adhere to any established company procedures or Federal Aviation Regulations will be so reported to the company for corrective action and to the Principal Operations Inspector-PAA for appropriate enforcement action.

The goal of this effort is to eliminate, to the maximum extent, all problems of cockpit discipline or complacency by PAA flight crews.

2. Conduct a master *review of PAA training records* and establish a file in the various Air Carrier District Offices on all weak pilots. PAA "Airman Profile" records should be monitored and follow-up surveillance accomplished, where indicated, making sure that such surveillance does not constitute harassment.

3. Require all PAA Check Airmen be *requalified and redesignated* after completion of the company approved check airman program. Such designations should be limited to those who are *fully qualified* and *current line captains.*

NOTE: This program will have to be accomplished over a period of time sufficient to give PAA the opportunity for selection and training of these airmen. In some cases, the flight requirement for requalification of a previous check airman might be waived. It may also be in the best interest of FAA and PAA to consider utilizing PAA captains who have reached the age of 60, but who can maintain currency in the simulator and aircraft.

4. *Amend PAA approved initial and recurrent training programs* to fit the operational needs of each major

area of operation. This would be done to increase the proficiency of PAA flight crewmembers and could involve increased amounts of simulator and flight training, where required.

5. Conduct studies and periodic reviews of flight schedule patterns for all crewmembers to evaluate operational fatigue problems. Appropriate recommendations to PAA would follow based upon results of subject studies.

6. A followup will be conducted in approximately six months by a special team to determine that positive corrective action has been taken by PAA.

We have prepared a draft letter for transmittal to PAA which covers the findings and recommendations of this final report (Exhibit 5).

NOTE: This special inspection report contains the input of all team members and was specifically reviewed and approved by all full-time members.

/s/ Jack W. Hudson
JACK W. HUDSON
Team Coordinator
Fort Worth Air Carrier District Office

* * * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE DAVID W. WILLIAMS, Judge Presiding

Nos. 70-3341
78-3761
78-3762
78-3763

MDL No. 214

Nos. CV 75-1364 DWW
CV 76-1120 DWW
CV 75-3293 DWW

IN RE: AIR CRASH IN BALI, INDONESIA
ON APRIL 22, 1974

JOHN P. CAUSEY, JR., ETC., *et al.*,
Plaintiffs,

VS.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants.

SIMONE RYDER, ETC., *et al.*,
Plaintiffs,

VS.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants.

MARGARET G. JOHNS, ETC., *et al.*,
Plaintiffs,

VS.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants.

REPORTER'S TRANSCRIPT

Monday, May 12, 1986 9:00 A.M.

* * * *

[3] THE COURT: In re Air Crash in Bali.

THE CLERK: Your appearances, counsel.

MR. ALLIS: Good morning, Your Honor. Nicholas Allis for Plaintiff Ryder.

MR. ROBINSON: Good morning, Your Honor. Mark Robinson and Kevin Calcagnie for Plaintiffs Causey.

MR. WINTERS: Good morning, Your Honor. Daniel Winters for Defendant Pan American World Airways.

THE COURT: Mr. Winters, this is your motion. I guess you had better take the stern wheel.

MR. WINTERS: Thank you, Your Honor. What we have here is a series of motions in limine, many of which were dealt with at the first trial, Your Honor. They are all on the same grounds, all of which, I believe, are well taken and will allow the case to be tried much smoother and shorter.

I think maybe if we could take them in groups, we could get through them faster. There are a number of them.

THE COURT: Well, let me see if I can put my hands on some of the things and have you address them as briefly as possible.

First, as I see from reading your papers, you take issue with the fact that the Plaintiffs want to have this jury know that this is a second trial, that the first [4] one has amounted to a reversal; and you also want the jury not to know of the limitations of Warsaw and Montreal.

Is that accurate?

MR. WINTERS: I think that is true. I think maybe more accurate—I suppose they will see the tickets, and on them necessarily are some numbers. I think the jury should not know the effect of assigning wilful misconduct. That is the specific issue which I address.

THE COURT: Why shouldn't they know it?

MR. WINTERS: Because it is irrelevant to their determination. They are to examine the evidence which relates to whether these folks handled themselves at a

certain level of culpable conduct. The fact that their finding will have an influence on damages has no relevance whatsoever. I think the cases are clear that the evidence as to damages should not affect the jury in determination of liability.

THE COURT: Well, your argument is lessened there by reason of the fact that this jury will not be called upon to fix damages.

MR. WINTERS: That is true, but they may very well be moved to find wilful misconduct to avoid some limitation which they have knowledge of. That would be an improper action on their part. It is not necessary for them to know what the importance of the finding of wilful is in [5] order for them to reach a determination whether this crew and this company acted at a certain level of conduct. It is irrelevant.

And there is a serious danger of prejudice. That is, they are being forced to find wilful misconduct in order to award the people more money.

THE COURT: That would only be the case if you had a jury that said that we are starting off now wanting to take a big shovel and shovel a lot of money in favor of the Plaintiffs. We don't want to see them come away with a small amount of money.

If I accept your argument, I must accept the notion that that is in that jury's mind.

MR. WINTERS: Your Honor, I think you should accept the notion that jurors are influenced by sometimes improper things and that it is the responsibility to, when it is possible without any other detriment to the case, keep those matters which might unfairly influence them from them.

Now, the fact that they might know the effect of wilful and wanton—if they knew that, that adds nothing to the case. They should not consider it in determination and evaluation of the conduct. It would be wrong for them to do so. It has no relevance to any issue. To keep it from them avoids what I believe to be a real possibility

that [6] they may find that certain level of conduct solely because they may think it is more beneficial to the Plaintiffs.

I don't suggest that the people who are going to come in here are going to feel that way, but there is that danger, and Your Honor can solve that danger by withholding this fact from them.

THE COURT: But I perplex the jury if I do that. I leave confusion in the jury's mind, and they will probably say, "Why in the mischief are we here if we don't know what we are doing? We are told to make some sort of a finding, and we don't know what the effect of that finding is."

Don't we confuse the jury in that respect?

MR. WINTERS: I mean, there are numerous trials that I have been involved in where specific issues are tried which don't end up in a judgment. The jury has a duty to follow your instructions and make findings. The fact that they may think why are we here, I don't think has a detrimental effect to whether they consider the evidence and decide whether the level of conduct was "A" or was "B."

THE COURT: Have you ever tried a damage case where the damages have already been fixed, sitting off nicely on the shelf somewhere, and all the jury has to do is take it off the shelf and give it to the Plaintiff? Have you ever tried a case like that?

MR. WINTERS: Not a bodily injury case. I have [7] tried property damage cases where the amount was agreed on.

THE COURT: That is different. But this case is the likes of which I have not seen before, where the Court of Appeals for some strange reason tells us that the Plaintiffs shall not have another go at damages; that there shall be no evidence taken of damages; that damages have already been fixed. It is a strange web of reasoning in my opinion.

I think this jury has to be told all of the facts of it. I think it has to be told why it is here again for a second trial. I think it has to be explained, albeit briefly, about Warsaw and Montreal.

I see a balancing of fairness. I see that if I hold your way and keep the secret from them, there is unfairness to the plaintiffs; and if I go the other way, there is a possibility of unfairness to you, but you are not going to suffer by your unfairness because one thing this jury cannot do is be a runaway jury. It cannot give $2 million worth of damages to these Plaintiffs.

MR. WINTERS: Your Honor, I can't understand. It is not my right to ask questions of you, and I don't intend to, but—

THE COURT: I don't mind.

MR. WINTERS: I don't understand how there is prejudice to the Plaintiffs to have the jury hear the [8] evidence which is admissible on the issue of wilful misconduct, have them instructed that they are to make a determination as to the quality of conduct and make it on that evidence alone.

It is no different than any trial on liability itself where damages are previously agreed on, which there are—at least I have been involved in others that have. There is no difference there at all.

To suggest otherwise would suggest that they won't take their responsibility seriously in that regard, and I think your experience and mine have been otherwise. They take their responsibility very seriously.

What you remove from them is a chance to make a determination on a wrong ground because they want to give somebody money against a big company which is otherwise not deserved under the law. That can be taken away if they just try the issues they have before them, which are in a sense less complex than the last time.

THE COURT: I continue to feel that we are putting a cloud over that jury. We are not explaining to them the real meaning of these limiting factors here—Warsaw and Montreal—and the limitation is such that the average

public doesn't know that that even exists, and this jury is entitled to be told that there is this phenomenon so that it can deal with it accordingly.

[9] Now, through jury instructions properly worded, I can tell them that it shall have no effect on their assessment of the evidence, that they must make a finding of wilful misconduct, whatever that is, and try my best to define for them what wilful misconduct says.

I have read some of the cases, second circuit, that try to define wilful misconduct, and I have come away from it glad I am not a juror, and that is strange enough to them; but I think I have to tell them about all of these limitations.

MR. WINTERS: Why is it necessary for them to decide why—if Pan Am acted in a certain manner, why is it necessary for them to know that that has an effect monetarily on someone? By even stating the proposition it should suggest an improper motive and relates to nothing.

THE COURT: If that jury has any modicum of common sense, it would go back and ask the question: what is the effect of this? Why are we called upon to make this finding?

And they ought to be told it in advance. This is not a hide and seek game.

MR. WINTERS: I am not trying to hide and seek anything. I am trying to take away a very real possibility that they will decide this for an improper purpose.

THE COURT: Well, as I have said—

MR. WINTERS: The evidence is irrelevant to any [10] issue—

THE COURT: I don't think so, and I think that a reasonable explanation of those facts ought to be told this jury.

Now let's get on with the other things. I think the ninth circuit has told us that the pilot's training records have to come in.

MR. WINTERS: I don't think I addressed that, Your Honor.

THE COURT: I don't think you did. One of the things you raised, further expert evidence of the pilot's competence or incompetence ought to be admitted.

Do you want to be heard on that?

MR. WINTERS: I did not raise that, Your Honor.

THE COURT: So you agree that it is admissible evidence?

MR. WINTERS: I think they are entitled to offer expert testimony as to what they believe is the competence of this pilot, or was.

I have addressed a number of other issues, though, that I think that is an issue in the case, and I have addressed other evidence which I don't think goes to that issue or any other issue.

THE COURT: Would one of them be the two reports, Hudson and Thomas?

[11] MR. WINTERS: Yes.

THE COURT: Let's talk about that. First explain to me what the Hudson report is. As I understand it, it was an FAA report that was begun a few days after this accident and possibly on account of the accident. Is that correct?

MR. WINTERS: It was done, I think—I can't tell you when exactly it started. I believe it started after the accident. It wasn't published until 1975. It was an account of this accident and several other Pan American accidents which happened in 1974.

THE COURT: What was the scope of the report?

MR. WINTERS: It was to review Pan American procedures and policies and suggest improvement in them.

THE COURT: Did it talk about the competence or incompetence of certain of its pilots by name?

MR. WINTERS: It referred to general activities of Pan Am in regard to evaluation. I think it attached as exhibits some pilot records, including the pilot record of Mr. Zinke, who is at issue in this case.

I don't believe—I don't have it here in front of me—they make a judgment in regard to Zinke one way or the other, but I may be wrong in that regard.

THE COURT: Somewhere plaintiffs have said that they feel that this report is useful by them as showing [12] that Zinke was the worst in the crowd. Is there any merit to that?

MR. WINTERS: I haven't seen anything that they may have filed in this regard. My motion in limine has been on file for six months, and I have received no opposition papers whatsoever.

THE COURT: Let's talk about that. I got mine Friday.

* * * *

[13] MR. WINTERS: I haven't seen them, Your Honor.

I'd be glad to address any arguments you have without analysis of them. I will hazard this. They haven't identified any expert—or any witness who can authenticate these documents. They are a mixture of hearsay and opinion done afterwards as an element of remedial conduct, which you found previously when this matter was raised back in 1978. I think it is the law of the case that—

THE COURT: I don't think it is. In the first place, I have a right to change my mind if I find I am wrong, and the ninth circuit certainly gave me ample reason for believing that I ought to try this case the second time and do it right this time. So it isn't the law of the case at all.

The plaintiffs say that the Hudson report is admissible under evidence code 803(8) as an official government report.

Address your objections to that.

MR. WINTERS: I suppose that makes it nonhearsay, but it certainly doesn't make it relevant.

THE COURT: 803, sub 8, is an explanation of matters that are not hearsay.

[14] MR. WINTERS: It is an exception to the hearsay rule.

THE COURT: Right.

MR. WINTERS: Whether the copy they have is authentic or not I don't know, but, putting that aside, 803 certainly doesn't make it relevant. It doesn't get around 407, which is the remedial conduct.

It doesn't solve the problems that have to do with covering of the issues not a part of this lawsuit, opinion testimony, hearsay on hearsay, which is the substance of this report. They went out there just to get an idea of what they thought was going on. They took hearsay documents from undesignated—hearsay declarations from undesignated persons. They put them in the report as quotes without saying who they were and whether they were authorized to make those or not. They get opinions without showing the competency of those people to make those opinions, and they list them in one big document, Your Honor.

It was clearly an effort that falls under 407 in the sense that Pan Am cooperated with them in that regard in an effort to make changes that could perhaps make differences.

They discuss a number of different accidents which are entirely different from ours.

THE COURT: I don't think they are entitled to [15] go into other accidents.

MR. WINTERS: Well, this report addresses a number of years. It just doesn't address this accident. It addresses a number of things based upon—things that I cannot cross-examine here. I don't think, Your Honor—I can't imagine the relevance of this document, except to suggest that Pan Am didn't have the appropriate procedures to find an incompetent pilot. That has never been raised in any document filed in this lawsuit.

I sent them contentions of fact, saying what do you contend in regard to gross negligence? They said that Zinke was incompetent. You knew it, and you should

not have allowed him to fly. Well, that is irrespective of what any of our procedures were, Your Honor. In the memorandum of law and contentions they make the same statements.

THE COURT: That, I guess, would be in support of their entrustment theory.

MR. WINTERS: I asked them, "what do you say in regard to the entrustment theory?" And they never raised this issue, Your Honor. They have a duty to supplement their answers to contentions, and they never have. They have a duty to set forth those issues in their memorandum of law and contentions, and they did not. I don't think it is an issue in this trial.

[16] THE COURT: But the Ninth Circuit spoke to that. The Ninth Circuit said that there was a sufficient raising of entrustment as a theory.

MR. WINTERS: They sent it back for trial on that issue, Your Honor. And subsequent to that I asked, "now tell me what your contentions are in regard to this entrustment issue."

And they said, "Zinke was incompetent," which they determined from looking at these records. "You knew it, and you shouldn't have sent him out there."

And they did not raise the fact that you have an incompetent procedure or you have an incompetent negligently conceived manner of evaluating pilots. They didn't raise that issue.

THE COURT: Well, as I understand it—and I haven't heard from the plaintiffs yet; maybe I should wait until I hear from them—but as I understand their contention, it is that they want to use the Hudson Report because they seem to say that the Hudson Report ends up saying that Zinke was one of the most incompetent pilots that they had on Pan Am and that Pan Am should have well known of his incompetence and should not have entrusted that airplane to him.

MR. WINTERS: Your Honor, I am not sure at all that the Hudson Report says that. Why don't they have [17] their experts say that instead of someone that they don't bring to court, someone who is not subject to cross-examination, based upon incompetent opinion and hearsay. It is based upon a document prepared in a remedial effort.

THE COURT: I don't know whether that was a remedial document. That seems admissible as an official government report because FAA sponsored it and brought it about as a consequence of this accident.

MR. WINTERS: That makes it nonhearsay, but it doesn't make it admissible, and it doesn't make it relevant, and it doesn't get around the fact that Pan Am participated in it as a remedial effort, just as Your Honor ruled previously.

THE COURT: I think I have to reverse myself on the Hudson Report, and I think for the purposes that the plaintiffs have indicated they wanted to use it that it is admissible.

* * * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE DAVID W. WILLIAMS, Judge Presiding

Nos. 70-3341
78-3761
78-3762
78-3763

MDL No. 215

Nos. CV 75-1364 DWW
CV 76-1120 DWW
CV 75-3293 DWW

IN RE: AIR CRASH IN BALI, INDONESIA
ON APRIL 22, 1974

JOHN P. CAUSEY, JR., ETC., *et al.*,
Plaintiffs,

vs.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants.

SIMONE RYDER, ETC., *et al.*,
Plaintiffs,

vs.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants.

MARGARET J. JOHNS, ETC., *et al.*,
Plaintiffs,

vs.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants.

REPORTER'S TRANSCRIPT

Tuesday, May 13, 1986; 9:00 A.M.

Volume 1 Pages 1-203

* * * *

[11] THE COURT: I am going to permit at a later time the lawyers to give you a more elaborate statement of what this case is about in their opening statements, but it is necessary for me to at this time tell you something about the case so that I may ask you certain questions in what we call voir dire in this jury selection process.

In the first place this is a lawsuit arising out of a very unfortunate air crash that took place in Bali, Indonesia. The accident happened way back in 1974, April 22 of 1974.

This Pan American aircraft was on its way to a place called Den Pasar Airport at the southern tip of the island of Indonesia, and it was supposed to land there. I think it was a nighttime flight.

For some reason, which maybe the lawyers will be able to explain to you, the aircraft made a wrong turn and instead of going southbound went northbound and crashed into a mountain and killed all of the persons onboard including all of the crew—some 110 or 15 or so persons. Two of those persons were Causey and Ryder.

[12] As I remember it, one of the families was from Virginia in our country, and one of the families was from Australia, I believe.

Now, you have already detected that I know something about this case, and I do because this is the second trial of it. This case was tried, and I tried the case, I think, in 1978 before a jury, and there were certain issues before that jury.

That jury rendered a verdict in favor of the plaintiffs in the case, awarding certain sums of money as damages. I will not tell you the exact monetary or dollar amount of those damages. This was in 1978.

The case went to the appellate court, and the appellate court did a reasonably strange thing. It said that there were certain errors made that required a retrial of the

case on certain of the legal issues, but it went on to say that the element of damages need not be retried.

Now, ordinarily when a case is reversed where there has been an award of damages of that kind, the entire matter is reversed and the entire case is sent back to be retried, and the second jury makes a determination not only of liability as to whether this company is liable, but it also makes a determination as to damages. The second jury's determination of damages is controlling.

But that is not the element—the element of [13] damages is not before this jury. This jury will have certain legal issues before it which it must decide, and if you decide those legal issues in favor of the plaintiffs, then the dollar amount of damages from the first trial stands as the award of damages.

If you decide against the plaintiffs on the legal issues, which I will tell you something about in a moment, then the plaintiffs do not obtain that larger amount of money, but are confined or limited, as we say, to a smaller amount of money that is controlled by something that we call the Warsaw Convention.

Now, years ago there was something enacted among the family of nations called the Warsaw Convention, and because the aircraft industry was in its infancy at that time it was felt that large awards of damages might be disastrous to the growing industry, and a family of nations, including the United States that later ratified the Warsaw Convention, came to a determination that if an air crash happened and if there were fatalities in it, there would be a limitation on the amount of money that could be gained through a lawsuit by the survivors of those families, and in succeeding steps it placed the limitation to what is now $75,000.

However, it said, and the courts have later carved out certain exceptions to this, that that limitation [14] should stand in place if there was just ordinary negligence proved on the part of the aircraft company in the happening of the accident, but that in the event either of

two other things happen, there was no such limitation, and the jury itself would make a determination of how high the damages should be.

One of those things should be that the Warsaw Convention requires that there be a delivery of a ticket to the passenger, and that that ticket would contain on it a sort of a warning, and the warning would say to them that there is such a thing as a Warsaw Convention. The Warsaw Convention places a limitation on the amount of damages that you could obtain or your survivors could if you were killed in an accident, and the purpose of the delivery of that ticket with that printed cautionary notice on it would be to give that ticket buyer an opportunity for self-protection. That means it tells him that you may —if you are killed in this accident, your survivors may be stuck with a $75,000 ceiling, and so you had better go to one of those machines in the airport and buy some additional insurance so as to leave your survivors better protected.

So the purpose of that warning notice on the ticket is to be sure that the limitation is brought to the attention of the ticket buyer.

One of the things that has constituted a problem [15] about that notice has been people have thereafter contended and the plaintiffs in this case do now contend, that that notice ought to be printed in large enough type face so that a person buying the ticket will look at it and read it and be made aware of the limitation and be able to take self-protective measures.

So the plaintiffs in some of these lawsuits say that the company is not justified in putting that cautionary notice in some language that is not understandable or that is so small that it can't be read. You have to give that ticket buyer an opportunity to read it and some way of calling it to his notice so that he can take the self-protective measures.

That will be one of the issues that will be before you as a fact for you as the jury to find is whether there

was in fact an adequate delivery of the tickets in these two cases to the ticket buyer under such circumstances as would enable that ticket buyer to be able to have a chance or an opportunity to read that ticket and see the cautionary notice concerning Warsaw and to take self-protective measures.

The adequacy of the delivery and the adequacy of the notice on the ticket will be one of the issues for you to make a determination concerning.

The other issue that will be before this jury will [16] be something we call wilful misconduct on the part of the pilot or crew and also wilful misconduct on the part of the company, Pan Am, in entrusting this airplane to the pilot that ran it and ran it into a mountain.

Wilful misconduct is a concept that I will have to deal with in instructions to you at some later time, but it is a higher degree of misconduct that ordinary negligence.

Now, you think in terms of two automobiles that collide in an intersection. One of them must have run a red light. Somebody is negligent. That is the type of thing that we ordinarily look to as jurors when you are hearing an intersection accident type of case.

This goes beyond that. The issues in this case will involve questions of well, there was a captain that was the pilot of this plane, whose last name was Zinke, Z-i-n-k-e, I think is the spelling. The plaintiffs have the burden of proving that Captain Zinke was one of the more incompetent pilots in the employ of Pan Am, that he should never have been entrusted with this airplane, that his incompetence was such that should have been even known to his employers before the happening of this accident, and that he should have been reevaluated or retrained or whatever in order to increase his position of competence, and that the company did not take measures that would protect the safety of its passengers in that regard, and they [17] let him continue on as an airline pilot.

So that the competence of Captain Zinke will be talked about by expert witnesses in this case, and it will be up

to you to make a determination whether doing the things he did or misdid that night, causing this accident, causing all of these deaths including his own, rose to the level of wilful misconduct. Wilful misconduct.

And if you determine that his actions did rise to the level of wilful misconduct, then if you find so by your unanimous vote, these plaintiffs are not held to the Warsaw limitation on damages. They get the damages that were awarded by the first jury.

One other theory of the plaintiffs is that—and it separates itself in some degree from the competence or incompetence of Zinke. It has to do with the actions on the part of the company itself, Pan Am, whether Pan Am should have known of the incompetence of Captain Zinke and not entrusted this airplane to him.

If you should find from the facts of this case that the facts rose to the level of wilful misconduct even on the part of the company itself in the negligent entrusment of this airplane to Zinke, then if that is your unanimous opinion, it would support a finding of wilful misconduct, and you will then have completed your task in this case. [18] Now, there is another side of this coin as you can readily understand, or we wouldn't be here. The company itself has filed what we call an answer to this complaint or these complaints, and it takes the position that we admit that there was negligence on the part of the pilot, but we don't admit anything beyond that. We stubbornly resist the contention that there was wilful misconduct on the part of the company in entrusting this airplane to Zinke or that there was wilful misconduct on the part of Zinke himself in the manner in which he piloted this airplane and brought about a lack of discipline in the cockpit among the crew.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE DAVID W. WILLIAMS, Judge Presiding

Civil No. MDL-215-DWW

IN RE: AIR CRASH IN BALI, INDONESIA
ON APRIL 22, 1974

JOHN P. CAUSEY, JR.,
SIMONE RYDER,
MARGARET G. JOHNS, ETC., *et al.*,
Plaintiffs,

VS.

PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Wednesday, May 21, 1986

(Volume 6—Pages 1-189)

* * * *

TESTIMONY OF PLAINTIFFS' EXPERT DONALD E. KEMP

* * * *

[6-99] Q. Is there any other indication in the Hudson Report that Pan Am in fact did have pilots who were below minimum standards, whether or not they were given satisfactories during their check rides by Pan Am?

A. Yes. There's many indications in the report and I think if you—

Q. Due to retirement?

[6-100] A. That's exactly what I was going to give as an example, that they show in the report that the retirement rate, or I shouldn't say rate, I should say per year, the rate is given as starting with the year '71, they had approximately five.

Q. Now, what are you reading, so the jury will understand this?

A. Oh, I'm sorry. I'm in the Hudson Report, page 5.

Q. But what does this indicate? What the are figures that you are reading? What are those?

A. Well, it will indicate the number of failures, or early retirements, I should call them, per year and showing the change as occurs over a four-year period.

Q. Could you read the immediately preceding sentence in the Hudson Report to give it some background?

A. (Reading:)

> "Pan American's record of early airman retirements (other than medical) over the past few years as compared with the present program to identify the 'weak pilots' supports the above finding."

Q. And "the above findings" has to do with the fact that there were substandard pilots?

A. Right. That they have reviewed the records and [6-101] listed in exhibits the substandard captains.

Q. And as soon as the Hudson Report began, and the committee began—in what year was that again that the committee began?

A. They began in the year '74, in other words, following the accident.

Q. So the '74 early retirement, in other words, would they be particularly significant?

A. I think you have to compare not only one year, you have to see several years to see the change. That's what is significant, is the change.

Q. Could you read those years that are printed there so that we can find out what the change was?

A. All right. 1971, they had approximately five.

1972, approximately five.

1973, approximately fifteen.

1974, approximately forty plus. (Pan Am does not wish to release exact figures to the team.)

* * * *

[6-120] BY MR. ALLIS:

Q. In other words, what has to be present? Do you have an opinion as to what has to be present before a person like Zinke is focused on and identified as a substandard pilot, or first officer, and then removed?

A. I think you have to look upon it from the company organization, in other words, does the organization truly—or is it set up such that they would be able to identify a substandard airman.

Q. And did Pan Am have that type of organization?

A. At that time, no, sir.

Q. And is that indicated in the Hudson Report?

A. Yes, sir, it is in the Hudson Report.

[6-121] Q. Mr. Winters suggested that the FAA should stop Pan American from flying or use their enforcement powers to kick some pilots out.

What is your opinion of that, once the Hudson committee began investigation on April 28th, five days or so after the Bali air crash?

A. Well, I think the evidence is that Pan American in fact did cause early retirements. That's what you are having reference to?

Q. Yes. In other words, did or did not Pan Am immediately show improvement?

A. Yes, sir they did.

* * * *

TESTIMONY OF PLAINTIFFS' EXPERT JESSE RUSSELL COTTLE

[6-176] Q. How far back do safety departments go in the airline industry?

A. I really am only familiar with United Airlines in that regard and I do recall that we have had a safety officer at least since the late fifties.

Q. All right. Now, you said with respect to the promoting of cockpit discipline and self-discipline, that was an essential factor.

Do you have an opinion, based upon what you have learned from these reports, as to whether or not Pan American was up to the standard of the industry and up to the state-of-the-art with respect to that concept?

A. I have to believe that they did not effectively promote discipline, cockpit discipline, or self discipline, based on the records that we have seen, particularly of Capt. Zinke.

Q. What about with respect to what you have observed in the Thomas Report and in the Hudson Report?

A. And that also verifies that observation.

Q. Now, we talked about seeking out weak pilots and trying to eliminate them.

Do you have an opinion as to whether or not prior to the accident of 1974 Pan American was up to the [6-177] state-of-the-art and the standards of the industry in that regard?

A. My only knowledge really is from the Hudson Report. That indicates that in the three or four years prior to 1974, that they had relatively little activity in early-retiring pilots who were not proficient and that in 1974 they had a very large number, I think 40.

* * * *

FEDERAL RULES OF EVIDENCE 401, 403, 407

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 407. Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

FEDERAL RULE OF CIVIL PROCEDURE 49(a)

Rule 49. Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

WARSAW CONVENTION, ARTICLES 22 AND 25

ARTICLE 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

ARTICLE 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful mis-

conduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

THE MONTREAL AGREEMENT

(Agreement CAB No. 18900).

The undersigned carriers (hereinafter referred to as "the carriers") hereby agree as follows:

1. Each of the carriers shall, effective May 16, 1966, include the following in its Conditions of Carriage, including tariffs embodying Conditions of Carriage filed by it with any Government.

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention, or said Convention as amended by said Protocol, which according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.
>
> (i) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of U.S. $75,000 inclusive of legal fees and costs, except that, in the case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of U.S. $58,000 exclusive of legal fees and costs.
>
> (ii) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Con-

vention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person, who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention or the Convention as amended by the Hague Protocol and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) the piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of carrier) and certain other* carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S.

* Either alternative may be used.

$75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the Carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U.S. $8290 or U.S. $16,580.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private Company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such contracts of carriage. For further information please consult your Airline or Insurance Company Representative.

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts all of which shall constitute one Agreement. Any carrier engaged in carriage to which the Warsaw Convention or the Warsaw Convention as amended by the Hague Protocol applies may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

14 C.F.R. §§ 221.175, 221.176

§ 221.175 Special notice of limited liability for death or injury under the Warsaw Convention.

(a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATIONS OF LIABILITY

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $10,000.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statement shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type

at least as large as 10-point modern type and in ink contrasting with the stock on:

(1) Each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) the ticket envelope; *And provided further*, That a carrier which has heretofore been furnishing a statement including either the sum of "$8,290" or the sum of "$9,000," in place of the sum of "$10,000" in the text of the statement prescribed by this paragraph, may continue to use such statement until July 15, 1974.

(b) Each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall also cause to be displayed continuously in a conspicuous public place at each desk, station, and position in the United States which is in the charge of a person employed exclusively by it or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier to sell tickets to passengers whose transportation may be governed by the Warsaw Convention and whose place of departure or destination may be in the United States, a sign which shall have printed thereon the statement prescribed in paragraph (a) of this section: *Provided, however*, That an air carrier, except an air taxi operator subject to Part 298 of this subchapter, or foreign air carrier which provides a higher limitation of liability than that set forth in the Warsaw Convention and has signed a counterpart of the agreement among carriers providing for such higher limit, which agreement was approved by the Board by Order E-23680, dated May 13, 1966 (31 FR 7302, May 19, 1966), may use the alternate form of notice set forth in the proviso to § 221.176(a) of this chapter in full compliance with the posting requirements of this paragraph. *And provided further*, That an air taxi operator subject to Part 298 of this subchapter, which provides a higher limitation of liability than that set forth in the Warsaw

Convention and has signed a counterpart of the agreement among carriers providing for such higher limit, which agreemeent was approved by the Board by Order E-23680, dated May 13, 1966 (31 FR 7302, May 19, 1966), may use the following notice in the manner prescribed above in full compliance with the posting requirements of this paragraph.

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers traveling to or from a foreign country are advised that airline liability for death or personal injury and loss or damage to baggage may be limited by the Warsaw Convention and tariff provisions. See the notice with your ticket or contact your airline ticket office or travel agent for further information.

Such statements shall be printed in bold faced type at least one-fourth of an inch high.

(Sec. 402, 72 Stat. 757; 49 U.S.C. 1372)

[ER-708, 36 FR 22229, Nov. 23, 1971, as amended by ER-837, 39 FR 8319, Mar. 5, 1974; ER-844, 39 FR 16120, May 7, 1974]

§ 221.176 Notice of limited liability for baggage; alternative consolidated notice of liability limitations.

(a) Each air carrier and foreign air carrier which, to any extent, avails itself of limitations on liability for loss of, damage to, or delay in delivery of baggage shall cause to be displayed continuously in a conspicuous public place at each desk, station, and position in the United States which is in the charge of a person employed exclusively by it or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier to sell tickets to persons or accept baggage for checking, a sign which shall have printed thereon the following statement:

NOTICE OF LIMITED LIABILITY FOR BAGGAGE

For most international travel (including domestic portions of international journeys) liability for loss, delay, or damage to baggage is limited to approximately $9.07 per pound for checked baggage and $400 per passenger for unchecked baggage unless a higher value is declared and an extra charge is paid. Special rules may apply for valuables. Consult your carrier for details.

Provided, however, That an air carrier or foreign air carrier which provides a higher limitation of liability for death or personal injury than that set forth in the Warsaw Convention and has signed a counterpart of the agreement approved by the Board by Order E-23680, dated May 13, 1966 (31 FR 7302, May 19, 1966), may use the following notice in full compliance with the posting requirements of this paragraph and of § 221.175(b):

ADVICE TO PASSENGERS ON LIMITATIONS OF LIABILITY

Airline liability for death or personal injury may be limited by the Warsaw Convention and tariff provisions in the case of travel to or from a foreign country.

For most international travel (including domestic portions of international journeys) liability for loss, delay or damage to baggage is limited to approximately $9.07 per pound for checked baggage and $400 per passenger for unchecked baggage unless a higher value is declared and an extra charge is paid. Special rules may apply to valuable articles.

See the notice with your tickets or consult your airline or travel agent for further information.

Provided, however, That carriers may include in the notice the parenthetical phrase "($20.00 per kilo)" after the phrase "$9.07 per pound" in referring to the baggage liability limitation for most international travel. Such statements shall be printed in bold-face type at least

one-fourth of an inch high and shall be so located as to be clearly visible and clearly readable to the traveling public.

(b) Each air carrier and foreign air carrier which, to any extent, avails itself of limitations of liability for loss of, damage to, or delay in delivery of, baggage shall include on or with each ticket issued in the United States or in a foreign country by it or its authorized agent, the following notice printed in at least 10 point type:

NOTICE OF BAGGAGE LIABILITY LIMITATIONS

For most international travel (including domestic portions of international journeys) liability for loss, delay, or damage to baggage is limited to approximately $9.07 per pound for checked baggage and $400 per passenger for unchecked baggage unless a higher value is declared in advance and additional charges are paid. Excess valuation may not be declared on certain types of valuable articles. Carriers assume no liability for fragile or perishable articles. Further information may be obtained from the carrier.

Provided, however, That carriers may include in their ticket notice the parenthetical phrase "($20.00 per kilo)" after the phrase "$9.07 per pound" in referring to the baggage liability limitation for most international travel.

(c) It shall be the responsibility of each carrier to insure that travel agents authorized to sell air transportation for such carrier comply with the notice provisions of paragraphs (a) and (b), of this section.

(d) Any air carrier or foreign air carrier subject to the provisions of this section which wishes to use a notice of limited liability for baggage of its own wording, but containing the substance of the language prescribed in paragraphs (a) and (b) of this section may substitute a notice of its own wording upon approval by the Board.

(e) The requirements as to time and method of delivery of the notice (including the size of type) specified in paragraphs (a) and (b) of this section and the requirement with respect to travel agents specified in paragraph (c) may be waived by the Board upon application and showing by the carrier that special and unusual circumstances render the enforcement of the regulations impractical and unduly burdensome and that adequate alternative means of giving notice are employed.

(f) Applications for relief under paragraphs (d) and (e) of this section shall be filed with the Board (Attention: Assistant Director, Bureau of Pricing and Domestic Aviation, Legal Analysis Division) not later than 15 days before the date on which such relief is requested to become effective.

(g) Notwithstanding any other provisions of this section, no air taxi operator subject to Part 298 of this subchapter shall be required to give the notices prescribed in this section, either in its capacity as an air carrier or in its capacity as an agent for an air carrier or foreign air carrier.

[ER-708, 36 FR 22229, Nov. 23, 1971, as amended by ER-995, 42 FR 20459, Apr. 20, 1977; ER-1119, 44 FR 25627, May 2, 1979; ER-1310, 48 FR 227, Jan. 4, 1983; 48 FR 3585, Jan. 26, 1983; ER-1390, 49 FR 40005, Oct. 12, 1984]

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CLERK

No. 89-157

In The

Supreme Court of the United States

October Term, 1989

PAN AMERICAN WORLD AIRWAYS, INC.,

Petitioner,

v.

JOHN P. CAUSEY, JR., individually and as Executor of the Estate of JOHN P. CAUSEY, SR. and as Administrator with Will Annexed of the Estate of VIRGINIA D. CAUSEY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. THE PETITION SHOULD BE DENIED BECAUSE THE RULE 407 ISSUE AS DESCRIBED IN THE PETITION IS NOT PROPERLY PRESENTED BY THIS CASE..... 6

A. The Issue As Framed by Defendant Does Not Fit the Facts of This Case And Thus The Decision Below Does Not Conflict With Decisions In Other Circuits. 6

B. Rule 407 Does Not Require the Exclusion of the Hudson Report Because Any Subsequent Measures Were Offered For Other Permissible Purposes 9

C. The Issue Presented By This Case Is Not of Recurring Importance..... 10

D. Conclusion 12

II. THERE IS NO GENUINE CONFLICT IN THE CASE LAW REGARDING RULE 49(a) – EVEN IF ONE COULD BE FOUND, THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLUTION 13

CONCLUSION..... 20

TABLE OF AUTHORITIES

Page

American Airlines Inc. v. United States 418 F.2d 180, 196 (5th Cir. 1969) 10

Bauman v. Volkswagenwerk 621 F.2d 230 (6th Cir. 1980) 7

Bickerstaff v. South Central Bell Telephone Co. 676 F.2d 163, 167-69 (5th Cir. 1982) 10

Cate v. Good Bros., 181 F.2d 146 (3d Cir. 1950) 15

Chan v. Korean Airlines, ___ U.S. ___, 109 S.Ct. 1676 (1989) 18, 19

Davis v. United States, 417 U.S. 333, 342, 94 S.Ct. 2298, 2303 (1974) 18

Dixon v. International Harvester Co. 754 F.2d 573, 583 (5th Cir. 1985) 7

Dixon v. Southern Pac. Transp. Co., 579 F.2d 511 (9th Cir. 1978) 19

Gullett v. St. Paul Fire & Marine Insurance Co., 446 F.2d 1100 at 1105 (7th Cir. 1971) 15, 16

In re Aircrash In Bali, Indonesia, 871 F.2d 812, 816 (9th Cir. 1989) 15, 17, 18, 19

In re Aircrash In Bali, Indonesia, 684 F.2d 1301, 1313 (9th Cir. 1982) 18

Koonce v. Quaker Safety Products & Mfg. Co., 798 F.2d 700, 7818-19 (5th Cir. 1986) 7

Lindsay v. Ohio Pharmaceutical Corp 637 F.2d 87 (2nd Cir. 1980) 7

Louisell and Mueller, Federal Evidence Rule 407 §164 p381, 1655 p395 (Vol. 2 1985) 10, 11

Lowery v. Clouse, 348 F.2d 252, 259-261 (8th Cir. 1965) 16

Millard v. Municipal Sewer Authority, 442 F.2d 539 (3d Cir. 1971) 15

1B MOORE'S FEDERAL PRACTICE ¶ 0-404[10] 18

TABLE OF AUTHORITIES – Continued

Page

Ritigan v. New York Cent. R. Co., 291 F.2d 548 (2d Cir. 1961) 14

Skidmore v. Baltimore & O.R. Co., 167 F.2d 54 (2d Cir. 1948) 14

Thedorf v. Lipsey, 237 F.2d 190 (7th Cir. 1956).....15, 16

Venieris v. Byzantine Maritime Corp., 731 F.2d 1061 (2d Cir. 1984) 14, 15

Villari v. Terminix International Inc. 692 F.Supp. 568 (D.D.Pa. 1988)..... 7

Vockie v. General Motors Corp 66 F.R.D. 57 (E.D.Pa), Aff(d) Mem. 523 F.2d 1052 (3rd Cir. 1975)..... 7

Walther v. Omaha Public Power District, 412 F.2d 1164, at 1170 (8th Cir. 1969) 16

Wolf by Wolf v. Procter & Gamble Co. 555 F.Supp. 613 (D.N.J. 1982) 7

STATEMENT OF THE CASE

On April 22, 1974, Pan American World Airways, Inc. [hereinafter "**PAN AM**"] flight 812 with Donald Zinke as pilot in command crashed into the side of a mountain on the island of Bali, killing all passengers and crew. Plaintiffs are the three minor children and widow of decedent John Ryder and the adult children of decedents Virginia and John Causey. The case went to trial for the first time in 1978. At that trial, the crew of the aircraft was found guilty of negligence, but not guilty of willful misconduct. However, the United States Court of Appeals for the Ninth Circuit found that the trial court had erred in excluding proficiency records of the pilot and crew.[1] Therefore, the Court of Appeals remanded the case for retrial with direction that the evidence be admitted on the issue of willful misconduct.

The second trial was held in 1986 and the proficiency records of Captain Zinke were presented to the jury for the first time. The jury found that **PAN AM** was guilty of willful misconduct. The proficiency records showed that Captain Zinke was often incompetent in handling his command of a passenger aircraft, particularly when presented with more than one problem at the same time. Plaintiff's expert, Donald Kemp, was Chief of Accident Investigation of the Federal Aviation Administration [FAA] at the time of the crash. He testified that he had personally analyzed proficiency records of 600 flight crew members involved in various accidents. The proficiency

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[1] Proficiency Records are the history of a pilot's training and performance based in part on testing and simulators and "check" rides monitored by check pilots.

records of Captain Zinke were the "worst" he had ever seen.[2] Throughout his proficiency records Captain Zinke had shown an inability to follow "approach plates", as well as failure to plan ahead, simple errors in calculation leading to as much as a 500 mile miscalculation of his position on one trip, an inability to follow procedures, and constant problems in the approach and landing phase. The errors committed by Captain Zinke for years were repeated on Flight 812 and were therefore within the scope of foreseeability by competent management.

Another Plaintiffs' expert, Captain Cottle, testified in pertinent part as follows:

> "A. Yes, sir. We had available to us about eight and a half years of Mr. Zinke's training and proficiency and route checks. In that eight and a half years we have records of some 50 of those occurrences, either simulator or airplane training or a combination of route checks or report of a captain on a copilot, and even one report of a copilot on a captain.
>
> Of those 50, some 29 indicated a performance less than desired, less than normal." (May 21, 1986 RPT 186:14-187:21.)

Most dramatically, a co-pilot who flew with Captain Zinke two years before the crash wrote a lengthy letter to **PAN AM** headquarters detailing the deficiencies of Captain Zinke and concluding by stating:

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[2] May 16, 1986 RPT 159:10-16. References are to Excerpts filed by Appellant/Defendant in the United States Court of Appeals except where "Supp. Excerpts" follows the reference in which case the reference is the Supplemental Excerpts filed by Appellees/Plaintiffs.

> "In summary it is my opinion that Captain Zinke is below standards in his performance as pilot in command. His inability to think and react as a pilot in command could result in disaster should he not have constant supervision from his first officer and engineer." [Emphasis added.] [Ex. 114, Supp. Ex. pp 376-378]

In the second trial Plaintiffs went about proving the willful misconduct by management as follows:

1. The crew had been previously found guilty of negligence in its handling of Flight 812 which proximately caused the damages found by the first jury.

2. Prior to that time, the corporate management had sufficient information regarding the lack of proficiency of Captain Zinke, and its effect on other members of a crew under his command, so as to have been able to forecast that Zinke, and/or a crew under his command, would engage in substandard conduct in the future. Therefore, Captain Zinke should have been suspended or removed from the command pilot's rolls.

3. The entrustment of a plane and passengers to Captain Zinke's command, especially on a flight which required cockpit discipline and flight precision in order to avoid problems of terrain, constituted wrongful entrustment of a plane and passengers with a conscious disregard of the safety of those passengers.

The introduction into evidence of the Thomas report tended to corroborate the contention of "conscious disregard" by showing that corporate management could have been apprised of the laxity in safety procedure which pervaded the **PAN AM** flight personnel. This report also

revealed that management's kid-glove treatment of Captain Zinke was not an aberration, but an example of long-term malaise involving management inaction in the face of ongoing pilot, and other crew, infractions and deviations from the standards of the industry.

The Thomas Report analyzed deficiencies in **PAN AM** organization and management before the crash. The Court of Appeals found that the Thomas Report was properly admitted as an admission against interest pursuant to Rule 801(d)(2)(D). The Court also found that "since the Thomas Report, a comprehensive report many months in the making, was dated only one day after the Bali crash, it is patently clear it was not a response to the crash. We find no basis for treating the Thomas Report as a subsequent remedial measure."**PAN AM** takes no issue with this ruling in its petition.

Although not as important as the proficiency records and the warning letter from a former co-pilot to management, the Hudson Report also supported plaintiffs' position. The Hudson Report was the result of an official governmental investigation of **PAN AM** by the Federal Aviation Administration [FAA] launched immediately after the Bali Crash. The report, like the Thomas Report, analyzed deficiencies in **PAN AM** management and organization before the crash. In addition, the Hudson Report focused specifically on Captain Zinke. The Hudson Report labeled Captain Zinke "substandard" and found that his record of problems was three to four (3-4) times as long as any of the other "substandard" pilots identified in the report.

Both the Hudson and Thomas Reports made recommendations for the future. These recommendations were very similar and included better identification of substandard pilots and early retirement of them. The Hudson Report also contained figures showing more early retirements in 1974 than in previous years. It was never established how many of these retirements took place before as opposed to after the Bali air crash on April 22, 1974. The recommendations and early retirements were largely irrelevant to this case. This is because other parts of the reports, which were used extensively by Plaintiffs, specifically found substandard conduct before the flight. In considerable detail, both the Thomas and Hudson reports concluded that **PAN AM**, before the Bali air crash, suffered from substandard cockpit discipline (1Exc. Rec. 258; Pet.App. at 72a-74a),[3] inadequate or improper operational control by Captains (1Exc. Rec. 258; Pet.App. at 73a-75a, 76a-78a), lack of awareness of altitude and failure to utilize altimeter properly (1Exc. Rec. 261-171; Pet.App. at 73a-75a), failure to adequately identify and supervise substandard captains (1Exc. Rec. 257; Pet.App. at 76a-78a), inadequate checkairman program (1Exc. Rec. 279-280; Pet.App. at 70a-75a), and substandard training (1Exc. Rec. 283-291; Pet.App. at 73a-79a). Plaintiffs' experts testified that the crew and Captain Zinke demonstrated on Flight 812 the problems which had been identified in the Hudson Report as endemic in the **PAN AM** flight organization. (May 16, 1986 RPT 89-92, 113-14,

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[3] "Exc. Rec." refers to Excerpts of Record in the court of appeals; "Pet. App." refers to petitioner's appendix attached to Petition For Writ of Certiorari.

149:14-150:15, 152-165; May 21, 1986 RPT 98-104, 120-124, 172-177, 182-185; May 22, 1986 RPT 107-108; 176-184.)

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE RULE 407 ISSUE AS DESCRIBED IN THE PETITION IS NOT PROPERLY PRESENTED BY THIS CASE.

A. The Issue As Framed By Defendant Does Not Fit the Facts of This Case And Thus The Decision Below Does Not Conflict With Decisions In Other Circuits.

PAN AM'S statement of the issue when compared with the facts of this case demonstrates that the issue is not adequately presented by this case.

PAN AM'S statement of the issue is:

> "I. Whether the Federal Rules of Evidence protect remedial measures that are developed and implemented by a defendant under governmental supervision is an important question as to which the Circuits are in conflict."

The Hudson Report with its findings and recommendations was not "developed and implemented by a Defendant under governmental supervision." Instead, the Hudson Report was researched, authored and issued by the government.

All the cases from courts of appeals cited by **PAN AM** concern actions taken *not* by the government but by

Defendant.[4] Rule 407 does not require the exclusion of third party measures. See *Koonce v. Quaker Safety Products & Mfg. Co.*, 798 F.2d 700, 7818-19 (5th Cir. 1986); *Dixon v. International Harvester Co.* 754 F.2d 573, 583 (5th Cir. 1985).

In an attempt to force this case to fit within an issue **PAN AM** hopes is of interest to this Court, **PAN AM** has painstakenly searched the transcript of multiple days of testimony by Plaintiffs' experts and located several short passages referring to the statement in the Hudson Report that there were an increased number of early retirements in 1974. **PAN AM** did not establish that the early retirements were subsequent remedial measures[5] and even if they were, the evidence was unimportant.

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[4] Moreover, some cases cited by Defendant do not focus or mention the issue framed by Defendant – voluntary versus involuntary action by a Defendant pursuant to governmental pressure. See e.g. *Bauman v. Volkswagenwerk* 621 F.2d 230 (6th Cir. 1980); *Wolf by Wolf v. Procter & Gamble Co.* 555 F.Supp. 613 (D.N.J. 1982). Some of the cases cited by Defendant do not deal with Rule 407 at all. See *Lindsay v. Ohio Pharmaceutical Corp.*, 637 F.2d 87 (2nd Cir. 1980); *Vockie v. General Motors Corp.*, 66 F.R.D. 57 (E.D.Pa), Aff(d) Mem. 523 F.2d 1052 (3rd Cir. 1975). In *Villari v. Terminix International Inc.* 692 F.Supp. 568 (D.D.Pa. 1988), relied on by Defendant, the court agreed that Rule 407 "is hardly served by excluding evidence of a party acting under compulsion." In the instant case, **PAN AM** was found to be acting under compulsion. Finally, in all the cases cited by Defendant, the evidence of subsequent remedial measures was extremely important and dramatic. That is not the case here.

[5] Defense expert Healy explained the increase number of retirements on the fact that **PAN AM** "had a lot of captains, all of the same age, that were coming up towards retirement or to earlier retirement period at about the same time." Tr. May 29, 1986 at 11-70; Resp. App. 11a.

There is no evidence as to how many, if any, of these retirements took place after as opposed to before April 22, 1974, the date of the Bali air crash. Defendant has the burden at trial to show that the evidence is a subsequent remedial measure. There was no attempt to make such a showing by **PAN AM** at the trial.

To the extent the evidence goes to show that **PAN AM** had incompetent pilots before 1974 and/or should have known of that fact, the evidence is indirect, cumulative and harmless.[6] As noted in the Statement of Facts above, Captain Zinke's proficiency records and the co-pilot's warning letter constituted the most convincing and direct evidence of his incompetence and **PAN AM'S** notice thereof. The Hudson Report and the Thomas Report both contain powerful direct evidence of the incompetence of **PAN AM'S** pilots which should have been known to management. The Hudson Report, for example, specifically identified Captain Zinke and several other pilots as substandard based on their proficiency records. The Hudson team conducted its own proficiency checks on a significant number of **PAN AM'S** pilots and found that over 38 percent of **PAN AM** pilots in command failed those checks. The Hudson Report and the Thomas Report specifically found in their investigatory findings that **PAN AM** was deficient in its failure to adequately identify substandard Captains and in other related respects set forth above at p. 5 supra. This direct

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[6] Moreover, the negligence of Captain Zinke and the crew on Flight 812 was admitted so that to the extent such evidence tends to prove the negligence of the crew, it is irrelevant.

evidence of incompetence and notice to **PAN AM** overwhelms the circumstantial evidence of early retirements which requires several jumps in logic before it becomes relevant. The recognition that the evidence made no difference may be why **PAN AM'S** attorney chose not to object, or request a limiting instruction or redacting of that portion of the Hudson Report.

B. Rule 407 Does Not Require The Exclusion Of The Hudson Report Because Any Subsequent Measures Were Offered For Other Permissible Purposes

Parts of the Hudson Report which Defendant classifies as "remedial measures" were offered for permissible purposes. Rule 407 "does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as . . . feasibility of precautionary measures, if controverted or impeachment." Defense witnesses took the position at trial that identifying Captain Zinke as a substandard pilot and removing him as pilot in command was not feasible because of Union regulations which prevent firing pilots, and the fact that proficiency records showed Captain Zinke was competent, not incompetent. Tr. May 29, 1986, at 38-40, 46, 68-9, Resp. App. 7a-11a.

The evidence is also admissible as impeachment in the broad sense of the term because **PAN AM** argued throughout the trial that its system for training pilots was a good one and that Captain Zinke was not an incompetent pilot. Tr. May 29, 1986, at 46, 68-9; Resp. App. 10a-11a.

"If defense strategy includes assertions that all precautions had been taken, that no others would have been practicable, or even that claimant's proof distorts the conditions which prevailed at the time, then proof of subsequent measures becomes relevant for impeachment purposes and, as Rule 407 expressly recognizes, his use of proof is beyond the reach of the exclusionary provision." *Louisell and Mueller, Federal Evidence,* Rule 407 § 165 p395 (Vol. 2 1985); see *Bickerstaff v. South Central Bell Telephone Co.* 676 F.2d 163, 167-69 (5th Cir. 1982); *American Airlines Inc. v. United States* 418 F.2d 180, 196 (5th Cir. 1969).

C. The Issue Presented By This Case Is Not of Recurring Importance.

It is exceedingly rare that an investigative report prepared by a third party is the subject of objection on the grounds of Rule 407 as illustrated by the fact that Defendant has not cited any such cases from the courts of appeals. Therefore, the issue as presented by this case is not of recurring importance.

Even if this case involved a remedial measure developed and implemented by a Defendant under governmental supervision, the courts following the alleged Ninth Circuit rule are not helpless to restrict the use of such remedial measures. Rule 403 can be used to exclude proof of such subsequent remedial measures because of the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Finally, the policy basis enunciated by **PAN AM** for excluding the Hudson Report is open to serious doubt. **PAN AM** argues that potential Defendants should be able

to participate freely in accident investigations without being concerned that what is said might be used against them in later litigation. Here however, **PAN AM** had already stated essentially the same criticisms and recommendations that appeared in the Hudson Report in its own internal report, the Thomas Report, prepared before the Bali air crash. And as for the early retirements, the Thomas Report extensively discussed the need for such a program and the presence of substandard pilots in the organization. See 1Exc. Rec. 94-5. Inasmuch as the admissions had already been made by **PAN AM** in the form of the Thomas Report, there was little reason to be concerned about a repetition of them in the Hudson Report.

There are additional reasons why the policy basis as stated by **PAN AM** does not apply in this case. As noted commentators have stated:

> "There must be many persons who take subsequent remedial measures wholly unaware that there exists an evidential rule of exclusion; any person who *is* aware of such a rule is likely to know as well that the rule is easily circumvented; any person who is competently advised will know too that taking no action poses serious countervailing risks, since inaction in the face of a known danger increases the chance of liability to future claimants." Vol. 2, Louisell & Mueller *Federal Evidence* § 164 p381 (1985).

These doubts are particularly valid in the case at hand. **PAN AM'S** internal study, the Thomas Report, found that **PAN AM** had a fatality rate in 1973, the year before the Bali air crash, which was "six times the U.S. rate for fatal accidents per 100,000 flight hours". The

catastrophic consequences of inaction would have significantly increased the risk of future crashes, future liability and even the very existence of **PAN AM** as a competitive corporation. To argue that **PAN AM** would not have taken steps because of fear of civil suits by survivors of those killed is not realistic in view of these other potential problems.

D. CONCLUSION.

After 14 years of litigation, the families of those who died in the Bali air crash are entitled to see an end to this case. The evidence of early retirements and recommendations was largely superfluous to Plaintiffs' case.[7] The court of appeals properly applied an "abuse of discretion" standard as to the admissibility of the Hudson Report and upheld the exercise of discretion by the trial court. Even if some technical error may have occurred, and there has been no showing of such, it would be harmless in the context of this case because of the plethora of other, more direct, evidence on the same issue. Finally, Defendant's failure to object to evidence of early retirements or request limiting instructions or that offending parts of Hudson Report be redacted constitutes waiver and, in addition, signifies how little importance Defendant attached to early retirements or recommendations in the context of this case.

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[7] Plaintiffs' closing argument did not mention early retirements or specify any recommendations.

II.

THERE IS NO GENUINE CONFLICT IN THE CASE LAW REGARDING RULE 49(a) – EVEN IF ONE COULD BE FOUND, THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLUTION

PAN AM has suggested that there is a conflict in authority in the circuits which this court should resolve. The conflict, according to **PAN AM,** concerns the interpretation of the following portion of Federal Rule of Civil Procedure 49(a):

> "The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. . . . The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue."

PAN AM asserts that in the Seventh, Second, Third and Eighth Circuits, the aforesaid portion of Rule 49(a) mandates reversal when the trial court accurately but unnecessarily advises the jury of the legal effect of its findings. On the other hand, according to **PAN AM,** the Fifth and Ninth Circuits hold that the discretion conferred by Rule 49(a) is extremely broad and that advising the jury of the legal effect of its findings is appropriate, even when unnecessary.

In point of fact, although at first blush the language quoted by **PAN AM** may seem to be in conflict, the *holdings* in the different circuits are *not* diverse. Moreover, PAN AM has cited to no holding in any circuit which applied its view of the law, i.e. where a trial court was reversed because it explained the legal effect of the jury's

resolution of either special verdicts or special interrogatories.

All of the decisions cited by **PAN AM** agree that Rule 49(a) leaves the discretion to advise or not advise to the trial court. However, Rule 49(a) purports to state the circumstances under which the trial court has a *duty* to advise the jury. Its language does not prohibit or purport to limit the trial court's discretion to advise the jury. This distinction is significant, is noted in one decision relied upon by **PAN AM** and explains much of the perceived "conflict" in circuit authority.

The perceived conflict in the circuits is likewise not as clear as **PAN AM** suggests.

The decisions in the Second Circuit relied upon by **PAN AM** are not inconsistent with the result in this case. In *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54 (2d Cir. 1948), the court of appeals was dealing with a claim that the trial court had erred when it refused to give special verdicts. The court of appeals held the trial court had virtually unlimited discretion under Federal Rule of Civil Procedure 49(a) to employ a general verdict and engaged in a lengthy discussion of the relative merits of general versus special verdicts which included the *dicta* quoted by **PAN AM**. The holding in *Skidmore*, supra, had nothing to do with the issues presented by this Petition. The Second Circuit in *Ritigan v. New York Cent. R. Co.*, 291 F.2d 548 (2d Cir. 1961) did not have the question of the proper exercise of discretion under Rule 49(a) before it and the quoted language was mere *obiter dicta*, not relied upon in any other Second Circuit decision. In its more recent discussion of this issue in *Venieris v. Byzantine Maritime*

Corp., 731 F.2d 1061 (2d Cir. 1984) the Second Circuit acknowledges the judicial and scholarly criticism of the earlier language relied upon by **PAN AM**. As pointed out in *In re Aircrash in Bali, Indonesia*, 871 F.2d 812 at 815 (9th Cir. 1989) (*Bali II*) *Venieris*, supra, is entirely consistent with the reasoning and the result in this case.

Nor are the Third Circuit decisions relied upon by **PAN AM** inconsistent with the holding in this case. *Millard v. Municipal Sewer Authority*, 442 F.2d 539 (3d Cir. 1971) involved the contention that the trial court had abused its discretion by *not* telling the jury what limitations existed on third party liability. The question of the extent of the court's *discretion* to advise the jury was never addressed. Likewise, in *Cate v. Good Bros.*, 181 F.2d 146 (3d Cir. 1950) the trial court submitted special interrogatories. The appellant argued that the interrogatories did not direct the jury's attention to the existence and duty to mitigate damages. The court of appeals rejected this contention finding no abuse of discretion by the trial court since the information was not "required" by the jury.

The Seventh Circuit decisions relied on by **PAN AM** are also consistent with the result in this case. *Thedorf v. Lipsey*, 237 F.2d 190 (7th Cir. 1956) did *not* involve a contention that the trial court had abused its discretion by advising the jury of the legal effect of the special verdicts. Rather, the plaintiff argued that the trial court committed reversible error when it *refused* to advise the jury of the legal effect of its findings. The court of appeals found no error in the trial court's exercise of its discretion. As pointed out in *Gullett v. St. Paul Fire & Marine*

Insurance Co., 446 F.2d 1100 at 1105 (7th Cir. 1971)[8], *Thedorf*, supra, says little or nothing concerning the situation at bar, i.e. where a party claims the jury was improperly advised of the legal effect of its special verdicts. After distinguishing *Thedorf*, supra, the Seventh Circuit in *Gullett*, supra, held that counsel's explanation of the legal effect of the Special Verdicts was not reversible error. (*Gullett*, supra, 1105).

Finally, in *Walther v. Omaha Public Power District*, 412 F.2d 1164, at 1170 (8th Cir. 1969) the Eighth Circuit rejected the appellant's contention that the trial court committed error when it instructed the jury of the legal effect of its findings. Thus, *Walther* appears to be entirely consistent with the decision in this case. In *Lowery v. Clouse*, 348 F.2d 252, 259-261 (8th Cir. 1965) the court of appeals refused to adopt the interpretation of Rule 49(a) suggested by **PAN AM**.

The lack of any holding by a court of appeals that informing a jury of the legal effect of its findings is reversible error is not surprising in light of the language from Rule 49(a) referred to above which speaks only of when a court "shall give" explanations or instructions concerning findings.

As is demonstrated by the discussion above, the holdings of the courts of appeal are not in conflict even though certain decisions employ language in support of their results which conflicts with language contained in other court of appeals decisions.

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[8] *Gullett* is the only other Seventh Circuit case cited by **PAN AM**.

Another reason certiorari should not be granted on the Rule 49(a) issue is simply that the Ninth Cirucuit decision in *Bali II* is completely consistent with either of the supposedly conflicting views of Rule 49(a). In other words, the Ninth Circuit in *Bali II*, supra, at 815, applied the more limited "unless necessary" rule suggested by **PAN AM**.

The Ninth Circuit held that the intitial advice to the jury that a finding of wilful misconduct would avoid the Warsaw damage limitations and the subsequent instruction to the same effect[9] were not error because the jury "had to be informed about the limitation" and absent such information "would have deduced a connection on its own and it might have been erroneous." *Bali II*, supra, 815.

Thus the court of appeals actually grounded its decision upon a determination that the instructions and advice given to the jury in this case were reasonably necessary in light of the evidence presented and the potential for jury confusion. *Bali II*, supra, 815. All circuits appear to agree that, in such a circumstance, advising the jury of the legal effects of its findings is appropriate.

The court's advice and instructions with respect to the effect of the verdict were meant to prevent confusion and/or possible misinterpretation of the language contained in the Warsaw notices. *Bali II*, supra, 815. At the trial level the judge determined that the jury would be required, under the law of the case, to decide the issues of

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[9] June 3, 1986 RPT 21:13-22:1.

adequacy of notice and delivery with respect to the Warsaw convention.[10] In its Petition **PAN AM** does not take issue with this conclusion by the court of appeals. Rather, **PAN AM** attempts to circumvent this holding by arguing that the issue of adequacy of notice should never have been presented to the jury. Thus, the argument proceeds, the jury would never have the Treaty before it and could not be confused.

PAN AM relies upon *Chan v. Korean Airlines*, ___U.S. ___, 109 S.Ct. 1676 (1989) for the proposition that inadequacy of notice cannot be the basis for avoiding the Warsaw damage limitations. *Chan* was decided after *Bali II* was filed[11] and the appellate decision in *Bali II* was *not* based upon any inadequacy of notice or delivery. Instead, the court of appeals upheld the judgment because **PAN AM** had been found to have engaged in wilful misconduct. Such a holding is entirely consistent with *Chan*, supra.

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[10] *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301 at 1313 (9th Cir. 1982) (*Bali I*):

> "On remand, **PAN AM** will be required to prove ticket delivery and adequate notice before the Warsaw limitation could be applied."

[11] A trial court and a court of appeals are not required to comply with the rule of the law of the case where there has been some intervening change in the factual context or there has been an intervening change in the law applicable. *See* 1B MOORE'S FEDERAL PRACTICE ¶ 0.404[10]; *Davis v. United States*, 417 U.S. 333, 342, 94 S.Ct. 2298, 2303 (1974). In this particular unique situation, there had been no change in factual context nor any change in applicable law when *Bali II* was filed.

Moreover, **PAN AM** chooses to ignore the fact that the *Chan* decision requires the carrier to prove that it properly *delivered* a ticket. *Chan*, supra, 1680. ***PAN AM introduced the tickets and moved for their admission.*** (May 14, 1986 RPT 19:12-20:5; May 15, 1986 RPT 212:19-213:11.) **PAN AM** also moved for admission of the text of the CAB regulations. (May 30, 1986 RPT 119:5-121:16.) Both of these exhibits contained a number of references to the dollar amount of the limitations if Warsaw were found applicable. (*See* Appendix to Petition, pp. 113a-118a, Appendix to Response, pp. 1a-4a.) As pointed out in *Bali II*, supra, at 815, the jury was advised of the effect of a finding of wilful misconduct in order to avoid the potential that they would jump to an erroneous conclusion as to the effect of their findings. Although not noted by the Ninth Circuit, one concern expressed below was that the jury might misconstrue the wilful misconduct finding as one for punitive damages.[12] (June 3, 1986 RPT 21:13-22:1.)

No prejudice has been or could be shown to have resulted from the court's informing the jury of the fact that a finding of wilful misconduct would avoid application of the Warsaw limitations. See, *Dixon v. Southern Pac. Transp. Co.*, 579 F.2d 511 (9th Cir. 1978). **PAN AM** speculates that the jury returned a verdict based not upon the facts, but upon emotion. There is nothing in the record which would support such a conclusion. Indeed, the fact that the jury found for **PAN AM** on the question of

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[12] Additionally, counsel for **PAN AM** appeared to argue that a finding of wilful misconduct would not result in any monetary effect on **PAN AM**. June 3, 1984 RPT 134.

whether the captain or crew had comitted wilful misconduct and also found for **PAN AM** on the issue of adequacy of notice and delivery,[13] supports the conclusion that the jury reached its verdicts based upon the evidence presented.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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[13] See Appendix to Petition, pp. 62a-64a.

Excerpt from Exhibits 317, 318, 319, 320, 323-A and 323-B

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain carriers, parties to such special contracts, for death of or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. The limit of liability of U.S. $75,000 above is inclusive of legal fees and costs except that in case of a claim brought in a state where provision is made for separate award of legal fees and costs, the limit shall be the sum of U.S. $58,000 exclusive of legal fees and costs. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000. The names of carriers, parties to such special contracts, are available at all ticket offices of such carriers and may be examined on request. Additional protection can usually be obtained by purchasing insurance from a private company. Such

insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.

Excerpt from Exhibit 328

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of Qantas Airways Limited and certain other carriers parties to such special contracts, for death of or personal injury to passengers, is limited in most cases to proven damages not to exceed U.S. $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U.S. $9,000 or U.S. $18,000.

The names of carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special

contracts of carriage. For further information please consult your airline or insurance company representative.

Note. The limit of liability of U.S. $75,000 above is inclusive of legal fees and costs except that in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of U.S. $58,000 exclusive of legal fees and costs.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE DAVID W. WILLIAMS,
SENIOR JUDGE PRESIDING

IN RE: AIR CRASH IN BALI, INDONESIA, ON APRIL 22, 1974	NOS.: 70-3341 78-3761 78-3762 78-3763
JOHN P. CAUSEY, JR., ETC., ET AL., PLAINTIFFS, VS. PAN AMERICAN WORLD AIRWAYS, INC., ETC., DEFENDANTS.	MDL NO. 215 NOS. CV 75-1364-DWW CV 76-1120-DWW CV 75-3293-DWW
SIMONE RYDER, ETC., ET AL., PLAINTIFFS, VS. PAN AMERICAN WORLD AIRWAYS, INC., ETC., DEFENDANTS.	VOLUME 11

MARGARET G. JOHNS, ETC., ET AL.,
PLAINTIFFS,
VS.
PAN AMERICAN WORLD AIRWAYS, INC., ETC.,
DEFENDANTS.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
WEDNESDAY, MAY 28, 1986

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TESTIMONY OF DEFENDANT'S
EXPERT KENNETH HEALY

(p. 11-34) Q Let me ask you this about those reports: In your opinion, did these reports conclude in any fashion that the Pan Am management was guilty of reckless misconduct?

A No.

Q Did these reports conclude that Pan American had a disregard of safety?

A No.

Q Do you believe that these reports concluded, using their words, however, accepting them as they are, that they had – that Pan Am, in training and evaluation, had fallen below Federal Aviation Administration standards?

A No.

Q Did these reports conclude that Pan Am had fallen below average airline standards, if those standards are somehow different than the F.A.A. standards?

A No. There are no words like that in there.

* * *

(p. 11-38) The Witness: Almost all airlines, at least up until deregulation here a few years ago, had union contracts which went into every phase of how a pilot or crew member could be handled. They – the contracts which were negotiated – and those are, in the case of airlines, are negotiated not only under the rules of the N.L.R.B., the National Labor Relations Board, but also – and I never particularly liked this, but also under the Railway Labor Act.

That's a long story and doesn't fit in here though, I'm sure.

They – when the contract is finally agreed to and ratified, it becomes, in essence, law, and how you will treat a man. It covers his scheduling, his training. You can't even give a man extra training without agreeing with the union on what it will be and how much it will be.

And then, in most cases, they want the man to be paid for that. I'm sure that when you to off to a seminar somewhere to improve your proficiency and learn new things in law, you would like to be paid for that too, and I'm sure you're not. But the pilot is. If he needs some extra training, in most cases – and in Pan Am that was certainly true – he got paid for that extra training.

Say, if the man is, for whatever reason – for (p. 11-39) Instance, it will go to the extent that if he fails his – he's come up for upgrading, he's been a first officer and come up for upgrading to captain, and you do not think he's progressing properly, you can't just drop him. The union will insist on extra training.

You give him the extra training, and he's still not up to what you want to accept. You then have to put him back to his previous position. And after x number of time, whatever is set forth in the contract – it's usually a period of so many months and so many hours of flying – if there's an opening for upgrading, the man can bid it again, and you train him again.

By Mr. Winters:

Q Let me ask you this: Does the airline decide who gets to bid from first officer to captain?

A Negative. Negative. That is strictly seniority as set forth by the union.

Q Does the airline get to decide which captain gets to fly which piece of equipment, a 707 or 747?

A No, No. That is, again, bid by seniority and by contract.

Q Does the airline get to decide which guy gets to fly which route?

A No, No. That is – you have bids for the – usually posted a month ahead of time, bids of lines of flying; and by seniority, they bid those.

Q Let me ask you this: You've reviewed captain Don Zinke's (p. 11-40) training records, have you not?

A Yes.

Q In 1967, sir, will you agree with me that he was in a precommand program and did poorly?

A Yes.

Q That is correct?

A Yes.

Q And he was dropped from that program?

A Yes.

Q And in 1968, he was allowed to reenter the program?

A Yes.

Q Do you believe that management decision to allow him to reenter the program was an appropriate one?

A Yes.

Q Why is that?

A Because it was in conformance with the contract and the bidding rules.

Q He was elevated to captain after a check ride in 1968, and Pan Am allowed him to captain 707 flights. Do you believe that decision in 1968 was appropriate?

A Yes. I have no reason to think otherwise.

Q You've reviewed the butler letter and Mr. Butler's testimony; is that correct?

A Yes.

Q And have also reviewed documentation as to Pan Am's

* * *

(p. 11-46) Do you believe that Pan Am's decision to entrust this plane to this crew, of which one of its five-man members was Mr. Zinke, do you believe they were justified, given their rules, the union rules, the F.A.A. standards, in allowing him to be a part of that crew?

A Yes.

Q Why is that, sir?

A I see nothing there that would justify them in removing him. He had certainly – as we stated earlier, he had some trouble in his precheckout training as a younger first officer, but his history, as we go through his records, shows a general betterment. And in the last three checks, as I remember, prior to that January line check, they were all satisfactory, and two of the three were monitored by F.A.A. personnel.

* * *

(p. 11-63) Q No, Sir. Do you remember that the Hudson Report said that, in summary, the team believes that Pan American has not had an effective check airman program, and thus numerous substandard airmen have been approved to continue in line operation? Do you remember that conclusion of the Hudson Report?

A Yes, I do, and I have a question on it. Those check airmen could not be operating as check airmen without the approval of the F.A.A. and why did the F.A.A. approve them if they were not satisfactory?

* * *

(p.11-68) Q Now, also, you said that you found, before ever reading the Hudson Report and seeing some of the missing records in the summary there, that Captain Zinke

was competent and should have been promoted to captain and should have been kept in captain's position, right? That was what your position was last fall?

(p. 11-69) A The record indicates that to me, and all I have is the record, just going on that record.

* * *

(p. 11-70) Q All Right. And did you also read that the number of these early retirements had risen from five in 1971-72 to 15 in 73 and over 40 in 1974, Paren, "Pan Am does not wish to release the exact figures to the team," end Paren? Did you read that?

A Yes, I read that, but I wondered at the time if there weren't some more factors that should have gone into understanding that properly, because among other things, Pan Am had a lot of captains, all of the same age, that were coming up towards retirement or to earlier retirement period at about the same time. This was a big problem to them, and that could have been a factor. There could have been a number of other things. I do not – I do not say that –

Q This is early retirement?

A – The figures are wrong. I'm just saying that I question it.

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE DAVID W. WILLIAMS,
SENIOR JUDGE PRESIDING

IN RE: AIR CRASH IN BALI, INDONESIA, ON APRIL 22, 1974	NOS.: 70-3341 78-3761 78-3762 78-3763
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DEFENDANTS.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
FRIDAY, MAY 30, 1986

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(p. 12-108) The Court: Well, let's talk about exhibits first. The defendant has certain objections to certain of plaintiffs' exhibits. I have a list of them here. I think the best thing to do is to start with the two reports, the Thomas report and the Hudson report. That's 35 and 36.

We certainly have heard lots about those reports to this jury, and I feel in my own mind that they ought to come in, but I will listen to the objections that the defendant has concerning them.

I think that – (pause.) I think certainly the Hudson report should come in under 803 sub (8), as an official government report, and the Thomas report seems to find some support in 801(d)(2).

Let me hear what the defendant has to say about it.

(p. 12-109) Mr. Winters: Well, your honor, I filed a motion in Limine previously, setting forth at length my objections to both these, and I'd like to incorporate those and not have to put them on the record again, if that would be appropriate.

The Court: Yes. I have read them.

Mr. Winters: And I believe, your honor ruled previously that at least the Hudson report come in. I renew my objections and I have no further argument in regard to the Hudson report.

With regard to the Thomas report, I assert again those objections. I state that I object to the report as not authentic, as there can be no foundation for it, violative of the best evidence rule, and I add those to my objections previously stated.

Your honor ruled in response to my motion in limine several weeks ago that it could be referred to by experts only. It was referred to by experts. In fact, it seems like the way it went was the expert would read the report to the jury or it would be read to them. I continue to assert my objections.

* * *

No. 89-157

FILED
OCT 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

JOHN P. CAUSEY, JR., Individually and as Executor of the Estate of JOHN P. CAUSEY, SR., and as Administrator with Will Annexed of the Estate of VIRGINIA D. CAUSEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

	Page
I. THE FIRST QUESTION IS PROPERLY PRESENTED BY THIS CASE: WHETHER THE FEDERAL RULES OF EVIDENCE BAR ADMISSION OF A DEFENDANT'S SUBSEQUENT REMEDIAL MEASURES WHEN THOSE MEASURES WERE OR MIGHT HAVE BEEN REQUIRED BY THE GOVERNMENT	2
II. WHETHER A DISTRICT COURT ERRS WHEN IT INFORMS THE JURY OF THE LEGAL EFFECTS OF ITS SPECIAL VERDICT FINDINGS IS AN IMPORTANT QUESTION PRESENTED BY THIS CASE	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: Page

Chan v. *Korean Air Lines, Ltd.*, 109 S.Ct. 1676 (1989) 7, 8

Lindsay v. *Ortho Pharmaceutical Corp.*, 637 F.2d 87 (2d Cir. 1980) 2

RULES:

Fed. R. Civ. P. 36 8

Fed. R. Civ. P. 49(a) 7

Fed. R. Evid. 403 ..... 2, 5

Fed. R. Evid. 407 ..... *passim*

MISCELLANEOUS:

Advisory Committee's Notes to Proposed Federal Rules of Evidence, 56 F.R.D. 183 (1972) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-157

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

JOHN P. CAUSEY, JR., Individually and as Executor of the Estate of JOHN P. CAUSEY, SR., and as Administrator with Will Annexed of the Estate of VIRGINIA D. CAUSEY, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

In its petition for certiorari, Pan American World Airways, Inc. ("Pan Am") urges the Court to review two rulings by the court of appeals: one holding that evidence of Pan Am's post-accident remedial measures, which were disclosed in a government report, were properly admitted because Pan Am had not "voluntarily" adopted and implemented those measures; and the second holding that the trial court permissibly informed the jury of the legal effects of its special verdict findings. Plaintiffs-respondents have now submitted their brief

in opposition ("Br."), and this reply is submitted by Pan Am in support of its petition.

I. THE FIRST QUESTION IS PROPERLY PRESENTED BY THIS CASE: WHETHER THE FEDERAL RULES OF EVIDENCE BAR ADMISSION OF A DEFENDANT'S SUBSEQUENT REMEDIAL MEASURES WHEN THOSE MEASURES WERE OR MIGHT HAVE BEEN REQUIRED BY THE GOVERNMENT.

Plaintiffs-respondents do not deny that there is a conflict in the circuits on the issue of whether the Federal Rules of Evidence bar the admission of subsequent remedial measures that were or might have been required by governmental regulation.[1] They do suggest, on a variety of grounds, that the question is not properly presented here and that the evidence involved was "unimportant" in this case. Br. 7. As we now show, these claims are without merit.

First, plaintiffs treat the Hudson report as though it were the subsequent remedial measure and then plaintiffs claim that Rule 407 is not implicated because that report "was researched, authored, and issued by the government," not by Pan Am. Br. 6. Plaintiffs' contention misses the point. The Hudson report described and reported the remedial steps that Pan Am had taken following the accident, including its effort in 1974 to increase retirements of allegedly "substandard" pilots. Pet. App. 72a-73a. Plaintiffs' experts testified about the

[1] Plaintiffs do argue that some of the cases cited in the petition are not squarely in conflict, Br. 7 n.4, but that effort is not persuasive. For instance, the results in cases such as *Lindsay* v. *Ortho Pharmaceutical Corp.*, 637 F.2d 87 (2d Cir. 1980), still conflict with the decision below even though those cases excluded the evidence of a defendant's subsequent remedial measures under Federal Rules of Evidence 403 (undue risk of prejudice or confusion), rather than Rule 407 (explicit exclusion for subsequent remedial measures).

report's description of those subsequent remedial measures by Pan Am, plaintiffs highlighted the measures in cross-examining Pan Am's expert (Br. 11a), and finally, the report was admitted into evidence.[2] In short, even though the Hudson report itself was not a subsequent remedial measure by Pan Am, the facts in the report and the testimony about those facts in the report concerned Pan Am's post-accident measures, and were subject to Rule 407.

Next, plaintiffs present a one-sided summary of the evidence and argue that the admission of Pan Am's post-accident remedial measures was "harmless." Br. 8. That assertion overlooks the facts that the first jury had found for Pan Am on the issue of liability and that this case did not turn on proof of simple negligence. To defeat the Warsaw/Montreal limitations on liability, plaintiffs were required to demonstrate that Pan Am engaged in "wilful misconduct" when it entrusted Flight 812 to Captain Zinke.[3] To meet this heavy burden, they needed all the evidence that they could muster. Plaintiffs' proof of wilful misconduct depended in significant part on evidence showing that there were systemic problems with Pan Am's training and evaluation of pilots; and the Hudson report supported plaintiffs' theory by showing that Pan Am had initiated changes in its pilot training and evaluation systems following the crash and had greatly increased its early retirement of "substandard" pilots.

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[2] Excerpts from the testimony of plaintiffs' experts are reprinted at Pet. App. 102a-105a. The Hudson report itself was not admitted until the close of the trial. Tr. May 30, 1986, at 12-111.

[3] In the trial court's instructions to the jury, wilful misconduct was defined, *inter alia*, as "the conscious performance of an act in such a manner as to imply a conscious disregard of the probable consequences of the performance of the act" or "the intentional omission of an act in a manner implying reckless disregard of the probable consequences." Tr. June 3, 1986, at 16-17.

Plaintiffs also argue that Pan Am's objections were insufficient. That argument is without merit, as the court of appeals implicitly held when it ruled on the merits of Pan Am's objections.[4] Plaintiffs even contend that Pan Am has not shown that the increases in early retirements in 1974 occurred after the Bali crash (Br. 8). The record makes clear, however, that the day *after* the Bali crash a recommendation was made to Pan Am's management that "the retirement system be modified to enable the company to give early retirement" to "weak pilots",[5] and the text of the Hudson report indicates that the increase in retirement commenced after the crash. Pet. App. 73a (Hudson report's reference to the "present program to identify 'weak pilots' "). In fact, plaintiffs' own experts construed the report as showing that the increase in retirements started following the accident.[6]

Plaintiffs argue that the Hudson report was admissible because Rule 407 allows evidence going to the "feasibility of precautionary measures, if controverted." Br. 9. The argument is unavailing because Pan Am did not controvert the feasibility of the remedial measures. It did not contend that its pre-crash pilot training system could not be improved or that "weak pilots" could not be provided with early retirement.[7] Moreover, plaintiffs'

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[4] Pan Am had moved *in limine* to exclude the Hudson report under Rule 407. 3 Exc. Rec. 874-88, 899-900.

[5] The recommendation was in the Thomas report, 1 Exc. Rec. 294, which was dated the day after the accident, Pet. App. 7a.

[6] Pet. App. 102a-105a. Such a construction was necessary to plaintiffs' case. If the retirement of "substandard" pilots had started before the crash, plaintiffs' claim that the entrusting of Flight 812 to Captain Zinke was not an aberration, but was due to systemic failures, would have been undercut.

[7] Plaintiffs' contention (Br. 9) that testimony for Pan Am relating to Captain Zinke's competence opened the door to admission of the Hudson report's descriptions of Pan Am's post-accident remedial measures is both unsubstantiated and wrong.

claim that evidence of post-accident improvements in Pan Am's pilot training system is admissible as impeachment "in the broad sense of the term because Pan Am argued throughout the trial that its system for training pilots was a good one . . ." (Br. 9) is flatly inconsistent with Rule 407. That "rule rejects the notion that 'because the world gets wiser as it gets older, therefore it was foolish before.'" [8] The mere fact that Pan Am's pilot training and evaluation system was capable of improvement following the crash does not "impeach" Pan Am's position that its previous training and evaluation of pilots did not constitute wilful misconduct.[9]

Finally, plaintiffs assert that the issue presented is not of recurring importance.[10] Br. 10-12. As shown in the

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[8] Advisory Committee's Notes to Proposed Federal Rules of Evidence, 56 F.R.D. 183, 226 (1972), quoting *Hart* v. *Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. (n.s.) 261, 263 (1869) (Bramwell, B.).

[9] The Hudson report does not suggest anything to the contrary. Its principal conclusion was that Pan Am, "in comparison with the air carriers to which the team members are assigned, *is below* the 'state of the art' in air carrier management, training, cockpit procedures, standardization, and adherence to established procedures by airmen." Pet. App. 77a (emphasis in original). In his testimony for Pan Am, Mr. Healy opined that, because the Hudson team members had been primarily drawn from FAA personnel covering American Airlines and United Airlines, the report was comparing Pan Am's programs to programs of those two carriers "who had the two best training facilities in the world." Tr. May 29, 1986, at 11-77 to -78. The fact that Pan Am's programs might not have been the equal of the best programs in the world does not establish that the operation of Pan Am's pre-crash programs constituted wilful misconduct.

[10] Plaintiffs state that some post-accident remedial measures required by the government might be excluded under Rule 403. Br. 10, but this concession does not eliminate the fact that there is a conflict in the circuits on whether such remedial measures are entitled to the broad protection that Rule 407 generally provides to subsequent remedial measures.

petition, however, the admissibility of post-accident remedial measures that were required or might have been required by the government is a question that has arisen and will continue to arise with some frequency, and the question is important to both the regulated entities and the regulatory agencies. Pet. 15-17.[11] In short, the issues raised by Question 1 of Pan Am's petition are important ones warranting this Court's review.[12]

II. WHETHER A DISTRICT COURT ERRS WHEN IT INFORMS THE JURY OF THE LEGAL EFFECTS OF ITS SPECIAL VERDICT FINDINGS IS AN IMPORTANT QUESTION PRESENTED BY THIS CASE.

In Question 2, Pan Am seeks review of the holding that a district court may inform the jury of the legal effects of its findings on special verdict even if such information is not "necessary to enable the jury to make its findings . . . ." Fed. R. Civ. P. 49(a). In their opposition (Br. 13-16), plaintiffs-respondents disagree with the court below that there is a conflict in the circuits as to whether "a district judge abuses his discretion when he informs the jury of the effect of its answers to special verdict interrogatories." Pet. App. 4a. Even if one assumes that plaintiffs are correct in claiming that the *holdings* of the cases might be reconciled in some fashion, the *rationales*

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[11] The contrary policy arguments made by plaintiffs, such as the quote on page 11 of their brief, in effect question whether Rule 407 should have been adopted at all. Congress answered that question when it enacted the Federal Rules of Evidence.

[12] At the conclusion of Part I of their brief, plaintiffs urge that the families of those who died in the crash are entitled to see an end to the case. Br. 12. But Pan Am is also entitled to have the question of whether it should be deprived of the protection of the Warsaw Convention tried in a fair trial. Only these two families have continued to try to attack the applicability of the Warsaw Convention in this air disaster. All of the other cases arising out of the Bali crash were settled years ago.

of the various courts are clearly in conflict, and that conflict will lead to a conflict in trial practice. In those circuits where the rationale conflicts with that of the Ninth Circuit, the trial courts will almost certainly refuse to charge the jury regarding the legal effect of its findings, because they know that to do so would be to invite reversal. On the other hand, district courts in the Ninth Circuit will be free to inform the jury of the legal effect of its finding. Hence, the conflict in the circuits is real.

Plaintiffs also contend (Br. 17-18) that the court of appeals' decision can be upheld on the ground that it was "necessary" to inform the jury about the legal effect of their findings because the jury was asked to decide whether Pan Am had given "adequate" notice of the limitations on liability. This argument necessarily assumes that the question of whether Pan Am gave adequate notice of the limitations was properly in the case. The court of appeals, however, expressly stated that it was not reaching that issue, Pet. App. 9a, probably because that question was then pending before this Court and because the courts in the District of Columbia had held that "adequacy" of notice is not a triable issue under the Warsaw Convention. See *Chan* v. *Korean Air Lines, Ltd.*, 109 S.Ct. 1676 (1989). *Chan*, of course, was decided after the court of appeals rendered its decision, but our point is that the Ninth Circuit's decision cannot properly be defended on a ground which that court explicitly refused to decide.[13] Hence, plaintiffs are wrong in asserting that the decision below can be upheld on the ground that the notice issue (which should not have been

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[13] If the court of appeals had actually decided that the adequate notice issue had been properly presented to the jury, Pan Am could then have sought certiorari on the ground that the decision below was contrary to *Chan*. And, if the court of appeals had ruled in Pan Am's favor on the issue, it presumably would have reversed.

submitted to the jury at all) made it "necessary" to inform the jury about the legal effects of its special verdict.

Finally, plaintiffs suggest that any error in informing the jury as to the legal effects of its finding was harmless, because even under *Chan*, Pan Am would have had to prove delivery of the decedents' tickets, which contained notices of the Warsaw Convention limitations. Br. 19. That may be true, but if the "adequate" notice issue had not been tried in this case, there would have been no possible need for testimony regarding the text of the notices (Pet. 8-9 & n.21), no possible justification for closing arguments regarding the limitations (Pet. 5-6 n.11,) and no possible need for instruction regarding the limitations (Pet. App. 95a-100a). If the only issue had been delivery of the tickets, Pan Am could have established such delivery by other means than introducing the tickets, such as by answers to requests for admission. Fed. R. Civ. P. 36. It was only because "adequacy" of notice was an issue at trial in this case, that counsel for Pan Am was compelled to introduce copies of the decedents' tickets to show that they contained all required notices of the Warsaw Convention limitations.

CONCLUSION

For the reasons contained in the petition, a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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